THE END OF LAW:
CANADA'S NATIONAL SECURITY LEGISLATION AND THE PRINCIPLE OF SHARED HUMANITY

by

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THE END OF LAW: CANADA'S NATIONAL SECURITY LEGISLATION AND THE PRINCIPLE OF SHARED HUMANITY

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Canada's *Anti-terrorism Act*, enacted in the aftermath of September 11th, has been assailed by critics as threatening fundamental rights. The *Act's* extraordinary powers will likely to be used primarily against Muslim Canadians, thereby creating an inferior subset of citizens and offending what Ronald Dworkin calls the principle of shared humanity. That principle suggests that every person is entitled to equal respect and dignity based on their humanity, rather than status, faith or ethnicity. The *Act* also makes distinctions between citizens and non-citizens, further revealing how Canada's national security legislation and jurisprudence, especially in the field of immigration, offend shared humanity. While citizens are offered somewhat greater respect than non-citizens, the courts have nevertheless shown exceptional deference to government claims of national security under the *Act*, as they have historically under other legislation. Even with the advent of the *Charter*, courts have not fully embraced their oversight role where national security is concerned.

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INTRODUCTION

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.
>
> ~ ***Canadian Charter of Rights and Freedoms, Preamble***
>
> O you who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be against rich or poor; for Allah can best protect both. Follow not the lusts of your hearts, lest you swerve, and if you distort justice or decline to do justice, verily Allah is well acquainted with all that you do.
>
> ~ ***Qur'an, Chapter 4, verse 135***

As a lawyer and a Muslim Canadian, these articulations of the primacy of the rule of law have a significant resonance. Both suggest that the law is grounded in principle and morality rather than being comprised of a set of rules that can be changed from time to time. Both hold within them the promise of fairness and justice for all human beings. Both reflect what Ronald Dworkin described as the keystone of moral principles, "the principle of shared humanity". Dworkin, writing about the current state of law and morality in the United States, captured the idea in these words:

> Among the most fundamental of all moral principles is the principle of shared humanity: that every human life has a distinct and equal inherent value. This principle is the indispensable premise of the idea of human rights, that is, the rights people have in virtue of being human, and it is therefore an indispensable premise of an international moral order.[1]

[1] R. Dworkin, "Terror & the Attack on Civil Liberties" The New York Review of Books, Volume 50, Number 17 (November 6, 2003); accessed at www.nybooks.com/articles/16738. See also D. Cole, "Enemy Aliens" (2001-2002) 54 Stanford L. Rev. 953 for a discussion of the distinction between citizens and non-citizens. Cole suggests, as do I in this paper, that non-citizens have been subjected to extraordinary measures that often violate constitutional rights where national security is involved; he argues for a commitment to values that resonates with the notion of shared humanity. Some values are so basic that they "are best understood not as special privileges stemming from a specific social contract, but from what it means to be a person with free and equal dignity." (at 957) For example, while voting can be reasonably tied to the privileges of citizenship, other rights, such as due process, security against cruel and unusual punishment and equality are not dependent upon citizenship. He focuses on the aftermath of the attacks of September 11, 2001 to show that Muslim and Arab non-citizens have had their rights severely curtailed in order to gain a false sense of security for citizens. The case of John Walker Lindh is contrasted to that of detainees at Guantanamo Bay to illustrate that citizens matter

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Shared humanity grounds both liberal democratic and Islamic conceptions of society. It is in many ways coincident with what I perceive as the ultimate goal of the project of social organization: the preservation and advancement of human dignity.[2] Law plays an important role in furthering this goal; and where the law ensures outcomes are consistent with this goal both the law and those outcomes may be said to be just. Therefore, shared humanity and human dignity are of such significance that they may be described as pre-existing or primordial principles, which manifest themselves in society through rules designed to mediate relationships between human beings, and between human beings and the state.[3] For

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in the eyes of the United States government; Lindh was tried through ordinary criminal proceedings while the Guantanamo detainees faced military tribunals at best. Lindh is a Muslim citizen and the Guantanamo detainees are Muslim non-citizens. While this example does highlight the citizen-non-citizen distinction it does not fully account for the treatment of citizens Yasser Essam Hamdi and Jose Padilla both of whom have been held without access to lawyers or judicial review of their detention. Recent decisions from the United States Supreme Court have accorded Hamdi and the Guantanamo detainees some narrow rights to challenge their detention but it does not compare to the treatment afforded Lindh. The Court ruled that Hamdi may challenge his detention without charge. Padilla's issues were not addressed due to a technicality arising from the government moving him, unbeknownst to his lawyer, from New York to South Carolina. This secret move rendered his *habeas corpus* petition invalid because the appropriate respondent in the claim ought to be the warden of the military prison where he is now held, rather than Defense Secretary Donald Rumsfeld who ordered his detention as an "enemy combatant". Padilla's case presents an especially troubling issue because it is not clear how the government will attempt to justify his detention when, or if, a court ever reviews it. While it can be argued that Hamdi is a "combatant", Padilla was neither engaged in hostilities nor was he detained outside the United States. In fact, he was arrested in Chicago. See *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004) [hereinafter *Hamdi*], *Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004) [hereinafter *Padilla*] and *Rasul v. Bush*, 124 S.Ct. 2686 (2004) [hereinafter *Rasul*]. In my view, the Lindh-Hamdi/Padilla distinction is of interest because it exposes a further distinction, between citizens themselves, based on ethnicity; Lindh is "white", while Hamdi is of Arab descent and Padilla is Latino. Apparently, America's preoccupation with race applies to its enemies as well. For a more detailed examination of Cole's thesis see D. Cole, *Enemy Aliens*, (New York: The New Press, 2003).

[2] The promotion of human dignity subsumes goals aimed at improving the human condition. For example, Dworkin's focus on equality is the basis of his argument on various elements of social and economic distribution of resources in order to effect just social outcomes. See R. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, (Cambridge: Harvard University Press, 2000). For an assessment of the role of moral principles, law and adjudication under *apartheid* in South Africa see D. Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991). My personal experience with law absent morality involves the expropriation of my grandfather's home and business property in rural South Africa under the *Group Areas Act*. Despite the fact that expropriation based simply on ethnicity is an affront to moral principles, such as shared humanity and human dignity, many courts in South Africa were true to the letter of the legislation rather than justice as dictated by moral principles.

[3] Although not relevant to the discussion in this paper, I would go further and suggest that these principles also encompass interaction with the environment since interdependence means that human dignity and well-being are linked to respect for the environment.

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example, Dworkin sees equality as a fundamental principle that derives from shared humanity. One could argue that fairness, transparency, impartiality and justification all derive from this fundamental principle as well because they give legitimacy to social institutions and their actions. And, these principles are manifest in more concrete forms through explicit human rights guarantees.

"Law", therefore, is not merely legislation. Rather, it is legislation that is cognizant of and consistent with moral principles. Without fidelity to morality, legislation is no more than a set of rules legitimized through formal process and backed by the coercive force of the state. The rule of law would simply be the rule of legislation, which Dworkin calls the "rule book" concept of the rule of law, according to which,

> the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all.[4]

While perhaps attractive because of clarity and accessibility, the rule-book concept lacks any spirit of morality. It thus lacks justice.

A more robust – more profound – notion of the rule of law,

> does not distinguish...between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that rules in the rule book capture and enforce moral rights.[5]

The title of this paper speaks to these concepts. Law has as its end or purpose, the furtherance of morality and hence justice. Where it fails to accomplish that end, society operates under a rule-book devoid of the legitimacy to be called "law".

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[4] R. Dworkin, "Political Judges and the Rule of Law", Proceedings of the British Academy, Vol. LXIV (1978), Oxford University Press at 261.

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As mediators of relationships in society, judges have a crucial role to play in this regard. They must ensure that legislation is consistent with fundamental moral principles that order society. This is how law ought to be; where its motivations should come from and what its purpose is. In reality quite a different picture can sometimes be revealed.

Law's reality came into sharper focus in a number of ways with the attacks against the United States on September 11, 2001. Those who orchestrated the attacks betrayed Islam's fundamental moral and legal precepts.[6] The United States launched the "war on terror", which Canada joined. One component of Canada's participation in this war included a domestic legislative agenda of new anti-terrorism measures, including the introduction of the *Anti-terrorism Act.*[7] The ATA has been criticized by many – including myself – as threatening civil rights on at least two fronts.[8] First, it is national security legislation passed as ordinary criminal law, yet the powers conferred by the ATA on the government are far from what would be considered acceptable under that legislation. Second, the ATA deals with the security of the nation, and as such raises important questions about identity and rights.

These concerns are not novel; they have arisen in previous instances of war and emergency in Canadian history. Faced with such crises governments have often rushed to distinguish friend from foe, using the law as a political tool. In many cases, these laws of convenience

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[5] *Ibid.* at 262.

[6] While this is not a paper about Islamic law, jurisprudence and morality I believe it is fair to say that the concept of a "shared humanity", and the principles that derive from it, resonates with Islamic philosophy and law, and as such, establishes significant common ground between Islam and liberalism.

[7] S.C. 2001, c. 41 [hereinafter ATA].

[8] See generally R. Daniels, P. Macklem & K. Roach (eds) *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill,* (Toronto: University of Toronto Press, 2001) [hereinafter Security of Freedom]. See also Z. Mia, "*Terrorizing the Rule of Law: Implications of the Anti-terrorism Act*", (2002) 14.1 National Journal of Constitutional Law 125.

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have strayed far from the principles of the rule of law both in practice and substance to a sphere where no moral ground, no spirit of shared humanity orders the law.

In this paper, I will examine how Canadian governments – historically and currently – have used the law to deal with national security threats, and more specifically, how the *War Measures Act*,[9] *Immigration and Refugee Protection Act*[10] and the ATA threaten rights in varying degrees. This discussion will be overlaid by two themes: (i) the tension between enemies and identity; and (ii) the role of the judiciary in ensuring that the pursuit of national security comports with the rule of law. In exploring these themes I hope to demonstrate that national security policy and legislation in Canada have created unfair distinctions between citizens and non-citizens and between citizens themselves, and in so doing have betrayed the principle of shared humanity. And, without this moral grounding or compass, national security legislation is "law" only in the nominal sense of being rules backed by the force of the state.

Chapter 1 addresses the WMA as an all-purpose tool that was used to deal with both citizens and non-citizens who were deemed to be threats to national security. During the two world wars, the WMA was used most notably against Ukrainians and Japanese in Canada who were perceived as enemy outsiders, even though many were Canadian citizens. This approach exposed strains in the integrity of our national identity, and in the worth and belonging of particular citizens. Rather than being based on common values or principles, citizenship was founded on nothing more than a shared ethnicity. Despite this and other glaring violations of

[9] S.C. 1914, c. 2 [hereinafter WMA].
[10] S.C. 2001, c. 27 [hereinafter IRPA].

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the rule of law, courts chose to defer to the executive's decisions, citing exceptional circumstances and national emergency as their rationales.

The WMA was used again during the October Crisis in Quebec against citizens. During that period some commentators criticized the federal executive's use of the WMA as unconstitutional because it usurped the judicial role. Noel Lyon and Herbert Marx argued that judges must always supervise the exercise of executive power, even in exceptional situations. This supervisory role obliges judges to test the implementation of policy against standards of legality or fundamental principles, including fairness, equality and accountability.

Following the October Crisis and abuses by the Royal Canadian Mounted Police ("RCMP") in the name of national security, the WMA was repealed in the 1980s and replaced with the *Emergencies Act*.[11] The new legislation differed from the WMA by constraining emergency powers temporally and providing parliamentary oversight. The 1980s also saw the repatriation of the Constitution, and more importantly, the introduction of the *Canadian Charter of Rights and Freedoms*.[12] The Constitution became the "supreme law" of the land and entrenched the role of the judiciary in upholding the rule of law through judicial review. Courts embraced their role and outlined a test of justification by which government action would be assessed when it affected rights.[13] Of particular relevance to the discussion in this paper are two important rulings of the Supreme Court of Canada during this period: (i) all people, regardless of status, are entitled the fundamental justice; and (ii) all government

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[11] R.S.C. 1985 c. 22 [hereinafter *Emergencies Act*].

[12] Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c.11, which came into force on April 17, 1982 [hereinafter *Charter*].

[13] *R. v. Oakes*, [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

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action, even where it involves national security, must comport with the rule of law.[14] These principles reinforced the importance of the principle of shared humanity and the primacy of the rule of law.

Despite these encouraging developments, one area of law and policy began to emerge as a significant anomaly. Chapter 2 examines the relationship between non-citizens, most notably refugees, and national security in Canadian policy and law. While refugees have traditionally been cast as threats in social and economic terms, the decline of the Cold War gave rise to the threat of "Islamic terrorism" coming from abroad; refugees naturally became suspect. The political rhetoric that accompanied the conflation of this particular subset of violence with some non-citizens also suggested that this new threat was not only external but also existential.

Given the nature of the threat, ordinary responses would not be adequate. Accordingly, Canada's immigration and refugee law adopted extraordinary measures to neutralize the new enemy. Under the IRPA security certificate procedure, non-citizens are subject to indefinite detention without charge based on secret evidence,[15] the ultimate aim of which is deportation. Ministers – not judges – make the detention decision. While judicial oversight is provided for, the process is veiled in secrecy because the substance of the security certificate hearing is held *ex parte*. Under the security certificate regime, fundamental rights, most notably to a fair and open process, are eroded.

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[14] *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 [hereinafter *Singh*] and *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 [hereinafter *Operation Dismantle*].

[15] The evidence is considered "secret" because it is not revealed to the detainee or his counsel. And, where deportation is not possible that detention effectively becomes indefinite.

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Security certificates also illustrate the extent to which policy choices and priorities have resulted in discriminatory application. It is telling that virtually all of the people currently held under security certificates are Muslim men. This fact demonstrates the extent to which the predilections of foreign policy and national security have entered the implementation of legislation. In reality, terrorism is effected through a wide array of violent acts carried out by state and non-state actors. But the only terrorism that seems to have currency with intelligence agencies and policymakers is Islamic terrorism. Moreover, the advent of the ATA highlights the differential treatment of citizens and non-citizens considered to be threats to national security. This distinction is explored in more detail in Chapters 3 and 4.

While the security certificate process violates fundamental rights and is applied in a discriminatory fashion such that respect for shared humanity is eroded, Canadian courts have consistently upheld it as constitutional. In this regard, the *Charter* has not had a significant impact on the treatment of national security matters by Canadian courts. The secretive nature of the process creates conditions where judges are bullied or co-opted into adopting a highly deferential stance toward the executive. Strains of judicial discomfort with the process have recently emerged, but in many cases, when faced with existential threats posed by shadowy outsiders, our courts have decided that the executive knows best. The Federal Court of Appeal when reviewing a wide-ranging challenge to the security certificate process in *Charkaoui v. Minister of Citizenship and Immigration and Solicitor General of Canada* recently endorsed this stance.[16] The result is that the IRPA security regime has created a vacuum of legality where judges have ceded their role, as articulated by Lyon, to test the implementation of policy against the standards of legality. Policy defined by the executive

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[16] 2004 FCA 421 [hereinafter *Charkaoui*].

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has occupied the void. Contrast this with the recent House of Lords decision reviewing a security certificate-type process in the United Kingdom.[17] Coming on the heels of *Charkaoui*, the House of Lords overwhelmingly rejected deference to the executive where national security legislation effected unjust outcomes, especially for non-citizens.

The events of September 11, 2001 reinforced the stereotype of the non-citizen "outsider as threat". Indeed, some politicians and pundits saw an opportunity to leverage their arguments against refugees and other migrants. However, those events also heightened fears and crystallized the idea of the citizen enemy. Since the IRPA did not apply to citizens it was not an effective tool against the "insider as threat". The ATA was the government's solution.

Chapter 3 examines the ATA, which was drafted from the stance that ordinary criminal law and other existing legislation are insufficient to deal with the new threats facing us. That stance asked courts and society to shift the balance between security and rights to favour the former. However, the government quickly moved away from characterizing the ATA in terms of a rights-security tension to casting it in more holistic terms of "human security"; that is, promoting human rights by protecting the state against existential threats. Canadians were told that the world had dramatically changed and we ought to "think outside the box".[18]

This call for new thinking asks judges to alter their approach to the adjudication of rights violations by the state where citizens are involved, especially where national security is concerned. Despite the use of holistic and inclusive language, the "human security" mantra

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[17] *A (FC) and others (FC) v. Secretary of State for the Home Department* and *X (FC) and another (FC) v. Secretary of State for the Home Department*, [2004] UKHL 56 [hereinafter *UK Detentions*].

[18] See I. Cotler, "Thinking Outside the Box: Foundational Principles for Counter-Terrorism Law and Policy", in Security of Freedom, *supra*, note 8, 111 and I. Cotler, "Terrorism, Security and Rights: The Dilemma of Democracies" (2002) 14.1 National Journal of Constitutional Law 13 [hereinafter Terrorism Security and Rights].

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simply dresses up national security legislation in a more pleasing costume. This approach has two significant consequences: (i) it directs judges to be increasingly deferential to the executive on matters of national security; and (ii) it challenges notions of citizenship and diversity because it raises questions about how our society is defined. "Human security", as employed by the government, has served to create divisions and to move Canada away from the principle of shared humanity.

Chapter 3 also illustrates how key elements of the ATA resonate with the architecture of the IRPA. While similar in structure, for example through the use of *ex parte* proceedings, secret evidence and detention without charge, the ATA does differ in tone and degree. This difference may be due in part to the mediating influence of the *Charter*, giving citizens somewhat more respect than non-citizens. Such differential treatment suggests a maturation in the perception and treatment of citizens where national security is concerned, but also highlights unfair distinctions between citizens and non-citizens that erode the principle of shared humanity.[19] Thus, the ATA falls between the IRPA and the ordinary criminal law in addressing the potential threat posed by citizens. Despite this, the ATA represents a significant challenge to fundamental rights and the rule of law.

The ATA includes a motivation requirement for defining and prosecuting terrorism, most notably that the impugned act be undertaken for a religious purpose. Given the status of Islamic terrorism as allegedly the primary existential threat facing us, one might have anticipated that Muslim Canadians would bear the brunt of investigation and prosecution

[19] However, this respect and maturation is complicated when on asks *which* citizens are taken into account? I believe this respect for citizenship was motivated more by a concern for the rights of the larger majority than for those of minority communities at risk of having their rights violated. Given the experience over the last three years it is clear that Muslim Canadians are bearing the brunt of the new national security enterprise, which

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under the ATA. Practical experience has borne this out. Numerous interviews and investigations of Muslim Canadians by police and security agencies have taken place over the last three years. As a result, the ATA may well create a subclass of citizens for whom the rule of law is relaxed in some cases and in so doing it erodes our shared humanity.

Chapter 4 addresses the role of the judiciary with respect to national security in the post-September 11th era. Canadian courts historically have been deferential to the executive on national security matters, and early indications suggest that they likely will not stray too far from that posture when it comes to dealing with non-citizen threats. Citizens on the other hand, can expect to be afforded somewhat greater protection from the courts.

Decisions of the Supreme Court of Canada and the Federal Court of Appeal following September 11, 2001 appear to confirm this assessment. *Suresh v. Canada (Minister of Citizenship and Immigration)*[20] examined the treatment of non-citizens under the IRPA security regime. While tinkering with the administrative process, the Court largely validated the executive's extraordinary powers to determine who is a security threat and so subject to detention without charge and possible deportation. *Suresh* also failed to reject deportation to torture unequivocally, thereby leaving the door open to future cases where this may be sanctioned. While *Charkaoui* adopted deference as emblematic of judicial review where national security is involved, it also exposed the difficulties faced by judges in discharging their sometimes competing and contradictory roles in security certificate cases.

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includes the "soft use" of the ATA. Therefore, it is possible that there was an unarticulated expectation in the popular discourse regarding the ATA that it would only apply to a particular subset of citizens.

[20] 2002 SCC 1 [hereinafter *Suresh*].

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The Supreme Court's first decision on the ATA in *Re Application under section 83.28 of the Criminal Code*[21] draws out the differences between citizens and non-citizens where national security is adjudicated in several ways. First, courts are not as deferential to the government where citizens are involved; and second, the Court's findings are not unanimous, with strong dissenting voices challenging the government's claims.

In any event, the House of Lords decision in *UK Detentions* stands in sharp contrast to the Canadian jurisprudence, because it robustly tests the effects of national security legislation against fundamental moral principles. It is a bold and courageous decision because it challenges the government in the absence of a constitutional guarantee of rights and in light of an explicit derogation from human rights legislation. Our courts do not face a derogation, in the form of an override of rights protection, and moreover have a constitutional guarantee of rights on which they may find purchase were they to choose moral principle over political practicality. Difficult choices lie ahead and Canadian courts may soon have an opportunity to respond to the Law Lords' call to ground the law in moral principle in order that justice is served.

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[21] 2004 SCC 42 [hereinafter *Air India*].

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CHAPTER 1. Enemy Aliens: The *War Measures Act*

Prime Minister Pierre Elliot Trudeau spoke the following words in a national broadcast to Canadians on Friday October 16, 1970:

> I am speaking to you at a moment of grave crisis, when violent and fanatical men are attempting to destroy the unity and freedom of Canada.... What has taken place in Montreal in the past two weeks is not unprecedented. *It has happened elsewhere in the world on several occasions*; it could happen elsewhere within Canada. *But Canadians have always assumed that it could not happen here* and as a result we are doubly shocked that it has.... *If a democratic society is to continue to exist, it must be able to root out the cancer of an armed, revolutionary movement that is bent on destroying the very basis of our freedom.* For that reason the Government, following an analysis of the facts... decided to proclaim the War Measures Act.... The War Measures Act gives sweeping powers to the Government. It also suspends the operation of the Canadian Bill of Rights. I can assure you that the Government is most reluctant to seek such powers and did so only when it became crystal clear that the situation could not be controlled unless some extraordinary assistance was made available on an urgent basis. The authority contained in the Act will permit Government to deal effectively with the *nebulous yet dangerous challenge to society represented by the terrorist organizations. The criminal law as it stands is simply not adequate to deal with systematic terrorism....* I assure you that the Government recognizes its grave responsibilities in interfering in certain cases with civil liberties, and that it remains answerable to the people of Canada for its actions. The Government will revoke this proclamation as soon as possible.[22]

Using the language of existential threats and arguing that ordinary criminal law was not sufficient to deal with the terrorists seeking to destroy Canada, Prime Minister Trudeau invoked the extraordinary powers of the WMA.[23] He was reacting to events that were unfolding with bombings and the kidnapping of British Trade Commissioner James Cross and Quebec's Labour Minister Pierre Laporte by the Front de Liberation du Quebec

[22] Notes for a National Broadcast By The Prime Minister Pierre Elliot Trudeau, Friday October 16, 1970 (emphasis added); accessed at http://collections.ic.gc.ca/discourspm/pet/1610970e.html.

[23] R.E. Salhany, *The Origin of Rights*, (Toronto: Carswell, 1986) at 68-71. The WMA Proclamation on October 16, 1970 declared that the FLQ's activities "have given rise to a state of apprehended insurrection within the Province of Quebec". This declaration was conclusive evidence that such a state of affairs existed and would only cease to exist when a further proclamation was issued declaring and end to that state of affairs.

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("FLQ").[24] The FLQ could generally be characterized as a movement seeking the liberation of Quebec from oppression by Anglo interests. The events of October 1970 came to be known as the "October Crisis".

Reacting to the events of September 11, 2001, the government of Prime Minister Jean Chretien marshalled similar arguments in support of its legislative and policy agenda. Government members of Parliament, including Justice Minister Anne McLellan and Irwin Cotler, spoke of existential threats and extraordinary circumstances. Despite these similarities, the Canadian government's response to the October Crisis and the events of September 11, 2001 were markedly different in at least one important way: Prime Minister Trudeau used extraordinary *temporary* measures, while Prime Minister Chretien resorted to extraordinary *permanent* measures.

These approaches reveal differences in the legal tools available to the government, which in turn expose an evolving tension in our conception of identity; national security legislation has become more nuanced over the last century. While the extraordinary powers of the WMA applied to citizen and non-citizen alike, the *Charter* era has created a dichotomy differentiated by status. The juridical distinction between citizens and non-citizens arose with the national security provisions of Canada's immigration law[25] and came into sharp relief after September 11, 2001 with the introduction of the ATA. In Chapter 2, I address the treatment of non-citizens deemed to be national security threats under the immigration law, while Chapter 3 examines the ATA and suggests that because it applies to citizens it is more respectful of rights and the rule of law when compared to the immigration regime.

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[24] Laporte was found strangled the day after the Proclamation was issued and Cross was released on December

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History of the *War Measures Act*

The WMA became law in 1914, during the First World War.[26] It placed extensive authority in the executive branch of government. Most notably, it allows the executive to determine whether an exceptional state of affairs exists, and as a result of such a finding, authorizes the use of extraordinary powers exercised *via* regulations passed by the Governor in Council.

For example, Prime Minister Trudeau invoked the WMA by issuing a "proclamation declaring the existence of an apprehended insurrection in Canada" ("Proclamation"). Section 2 of the WMA states:

> The issue of a proclamation by His Majesty, or under the authority of the Governor in Council shall be conclusive evidence that war, invasion, or insurrection, real or apprehended, exists and has existed for any period of time therein stated, and of its continuance, until by the issue of a further proclamation it is declared that the war, invasion or insurrection no longer exists.[27]

This gives the executive[28] exclusive power to determine whether a state of emergency exists and when it ceases to exist. In effect, the opinion of one person, or a small group of persons, is sufficient evidence that a war, invasion or insurrection exists or is feared. Such a determination is deemed to be final and conclusive and sets the stage for the concentration of vast powers in the hands of the executive. Under the authority of the proclamation the executive may do virtually anything that he, she or they determine is "necessary or advisable

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3, 1970. *Ibid.* at 70.

[25] IRPA, *supra*, note 10.

[26] See Salhany, *supra*, note 23. The WMA gave the federal government power to the rule by executive authority alone, which fell outside the normal parliamentary process and scrutiny.

[27] WMA, *supra*, note 9.

[28] The executive branch of government consists of the Prime Minister and Cabinet and by virtue of the Parliamentary system, effectively controls Parliament where the government holds a majority of seats in the House of Commons.

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for the security, defence, peace, order and welfare of Canada".[29] The Proclamation thus establishes the conditions for rule by executive order.

Until it was repealed, the WMA served as an all-purpose tool to deal with all manner of threats to national security. Quite simply, the Canadian state did not differentiate between enemies; regardless of whether they were citizens or non-citizens, all were subject to the same extraordinary executive authority.[30]

Prior to the October Crisis, the most notable use of the WMA's extraordinary power was during the two world wars: during the First World War, with respect to persons of Ukrainian heritage and others viewed as threats to Canada's security; and during the Second World War, especially with respect to persons of Japanese heritage. In light of the wartime context, both groups were branded as enemies because of their ostensible links to the Austro-Hungarian Empire and Japan, respectively. Despite the fact that there were citizens amongst them, all were subject to the same extraordinary measures. Similarly, citizenship did not provide a shield for many Quebeckers during the October Crisis against the extraordinary powers of the WMA. The interests of national security quickly devalued the worth of citizenship and moreover betrayed the principle of shared humanity by making distinctions that were not based on the rule of law. In this case the rule of law was not upheld by assessing the government's actions against the legislative requirements of the WMA and asking if all steps were properly followed in issuing a Proclamation. Rather, the rule of law

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[29] WMA, *supra*, note 9, s. 3. Powers under the WMA included, *inter alia*: censorship, arrest, detention, exclusion, deportation, transportation, trade, and appropriation of property.

[30] Even though many were citizens, ethnicity became the prime distinction; citizenship simply became coincident with ethnicity.

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requires just outcomes where rights are infringed and in this case outright discrimination openly offended the principle of shared humanity and the goal of human dignity.

Ukrainians

Following Great Britain's entry into the First World War, the Canadian government began to identify those of "enemy nationality" or "enemy aliens".[31] In many cases, Canadians of Ukrainian origin were misidentified as "Austrians" or "Austro-Hungarians"[32] and deemed to be disloyal and therefore a threat to Canada's security. Those identified as enemies were required to register[33] with the government and some were imprisoned in one of twenty-four internment camps situated in remote locations across the country.[34]

> The camps were supposed to house enemy alien immigrants who had contravened regulations or who were deemed to be security threats. In fact, "enemy aliens" could be interned if they failed to register, or failed to report monthly, or traveled without permission, or wrote to relatives in Austria.
>
> Other less concrete reasons given for internment included "acting in a very suspicious manner" and being "undesirable". By the middle of 1915, 4000 of the internees had been imprisoned for being "indigent" (poor and unemployed).[35]

Detainees were required to work in various capacities, often involving hard labour such as in road and railway construction, and in some cases working for private sector companies in

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[31] See L. Luciuk, "A Time for Atonement: Canada's First National Internment Operations and the Ukrainian Canadians 1914-1920" (Kingston: The Limestone Press, 1988) and D.J. Carter, *Behind the Barbed Wire Fence: Alien, Refugee and Prisoner of War Camps in Canada 1914-1916* (Calgary: Tumbleweed Press, 1980).

[32] This illustration of ignorance in bigotry was echoed after the attacks of September 11, 2001 when some Sikhs and Hindus were targeted during racist attacks as a result of their being misidentified as Muslims.

[33] 80,000 people were required to report to the government as "enemy aliens". Many were Ukrainians and approximately 5,000 of them were detained. See Luciuk, *supra*, note 31 and Carter, *supra*, note 31. The registration of some Muslims in the United States in the months following September 11 resurrected memories of the world wars.

[34] Many were interned in parks like Banff National Park and other remote areas.

[35] "Canada's Concentration Camps – The War Measures Act"; accessed online at www.educ.sfu.ca/cels/past_art28.html. See also Luciuk, *supra*, note 31 and Carter, *supra*, note 31. See Cole,

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order to ease labour market shortages caused by the war. It is astounding that many detainees remained imprisoned long after the war came to an end because they remained useful as a pool of cheap and easily accessible labour.[36]

The impact on individuals, families and communities was profound. Not only were property and time lost, but the degradation of dignity and humanity was immeasurable. Under the guise of war and national security concerns many people were quickly demonized and stripped of their basic human rights and dignity. This event in Canada's history demonstrates the significant risk of concentrating too much power in the executive. When "war" and "national security" come into play, governments tend to focus almost exclusively on preserving the "nation" at the expense of particular communities and individuals that make up the nation. This invariably brings to the fore tensions of identity, loyalty and belonging. History has demonstrated that these tensions are usually resolved by xenophobic distinctions that rarely serve to further genuine safety and security but invariably tend to stigmatize and alienate particular communities for generations.

Certainly, states must have the ability to defend themselves and preserve their existence. However, at what cost and in what way? The pursuit of security is not inherently problematic. The risk for individuals and communities arises where that pursuit is unchecked and untempered by the rule of law and more specifically, the principle of shared humanity.

Because a wide variety of concerns motivate war and emergency, those concerns also influence the responses to such events. Usually the spectre of a national emergency will be

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supra, note 1 for a discussion of similar pretexts (*e.g.*, expired visas and tardy immigration registration) for detention in the United States after September 11, 2001.

[36] Luciuk *supra*, note 31.

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tinged with fear, which is founded on misperceptions and misunderstandings of the "other". And, fear may give rise to a xenophobia that will likely drive policy and legislation. Left unsupervised, executive action in these situations will likely result in unjust outcomes for those deemed to be enemies of the nation. In the case of the WMA and those of Ukrainian descent in Canada during the First World War, both citizens and non-citizens alike found themselves beyond the reach of the rule of law.

Japanese

The WMA was also used during the Second World War. By an Order in Council[37] issued in 1940, Germans and Italians were identified as "enemy aliens".[38] More than 30,000 people were affected and much of what occurred echoed the experience of the First World War. Members of the "enemy" groups were required to register and several hundred were interned.

Following Japan's entry into the Second World War, a further Order in Council was issued authorizing the removal of "enemy aliens" from the west coast of Canada.[39] All persons of Japanese ancestry, regardless of citizenship, were deemed to be threats to national security

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[37] Essentially executive fiat rather than following the legislative process.

[38] Canada's Concentration Camps – The War Measures Act, *supra*, note 35.

[39] K. Adachi, *The Enemy That Never Was*, (Toronto: McLelland and Stewart, 1991) and A.G. Sunahara, *The Politics of Racism: The Uprooting of Japanese Canadians During the Second World War*, (Toronto: Lorimer, 1981). The United States government issued similar executive orders directed at Japanese-Americans, which included exclusion from prescribed military areas. Such military areas were similar to the "protected areas" of the Canadian orders and regulations, and they effectively covered the entire west coast of the United States. All persons of Japanese ancestry were deemed to be threats to national security and the American war effort. As such, they experienced a fate similar to those of Japanese ancestry in Canada including evacuation and internment. In both the United States and Canada the process that led to internment involved the designation and registration of "enemy aliens", prescribing their movements, confiscation of their property and ultimately their internment. For a discussion of extraordinary detention measures used in Britain during World War Two see A.W.B. Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (Oxford: Clarendon Press, 1992).

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and therefore required to leave British Columbia. They were given 24 hours to pack before being interned.[40]

In regulations issued by Justice Minister Louis St. Laurent implementing the evacuation, "All Persons of Japanese Racial Origin" were subject to various restrictions, including curfew, to facilitate their removal from the west coast. In the notice announcing the regulations, the enemy was described as "any person wholly of the Japanese race, [or] a person not wholly of the Japanese race if his father or mother is of the Japanese race".[41] The enemy was thus differentiated not by citizenship but rather by ethnicity. Arguably, the trauma of the Second World War reinforced the reality that, in the eyes of the Canadian state, the substance of citizenship was characterized almost exclusively by ethnicity.[42] Therefore, shared ethnicity appears to have replaced shared humanity as a guiding principle in the development and application of legislation.

The majority of Canada's Japanese population was affected by these orders under which thousands were sent to remote detention camps and others were put to work on farms and construction camps. Those who resisted found themselves in prisoner-of-war camps in Ontario. While in detention their property and possessions were held by a government

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[40] See Adachi, *ibid.* for a comprehensive history of Japanese Canadians including their treatment during World War Two.

[41] "Notice to All Persons of Japanese Racial Origin", accessed online at www.japanesecanadianhistory.net/lessons/gallery_walk05.htm. See Adachi, *ibid.* at appendices III – XIII.

[42] Three quarters of those affected were Canadian citizens, see Adachi, *ibid.* at 371. One can see a parallel in the current conception of terrorism as a threat. One subset of this form of political violence, namely "Islamic terrorism", has taken on the role of primary threat. Therefore, Muslims have almost exclusively borne the brunt of various national security measures. Just as "Japanese" or "Ukrainian" origin was a criterion for suspicion during the world wars, so too it appears is being Muslim in the current context. However, as will be discussed in Chapters 2 and 3, while faith is used to differentiate friend from foe, its current application is more nuanced than under the WMA. Today citizenship serves, to some extent, to insulate citizen Muslims from the more odious national security measures that non-citizen Muslims are subject to.

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agency and ultimately sold without their consent. Adding insult to injury, the proceeds of these sales were used to pay for their internment.[43]

While national security was the ostensible justification for the removal of ethnic Japanese from the west coast, other less noble motives were also in play. Some have argued that the registration and ultimate removal of Japanese from the west coast "was a culmination of the movement to eliminate Asians from the west coast begun decades earlier in British Columbia."[44] Indeed, ethnic Japanese were subject to racism in British Columbia and then-Prime Minister Mackenzie King suggested that "[t]he sound policy and best policy for the Japanese Canadians themselves is to distribute their numbers as widely as possible throughout this country where they will not create feelings of racial hostility."[45] National security, it appears, was not the only factor influencing the Prime Minister's decision-making. Apart from the fact that this approach adopts a "blame the victim" paradigm, it gives credence to the claim that the exclusion of all persons of Japanese ancestry from the west coast during the Second World War was part of a larger social enterprise.[46]

> Anti-Oriental feeling in Canada began in British Columbia in 1858, the year that Crown colony was established. It was also the year of the Caribou Gold Rush, and the start of Chinese immigration to British Columbia to fill the need for cheap labour. In the 1880s, Japanese immigrants arrived on Canada's west coast and following the Chinese immigrant pattern, provided cheap labour for railway construction, mining and logging.
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> Although Canada was prepared to welcome Orientals as a source of cheap labour, it was not prepared to consider them as persons. Only a "person" was entitled to vote in federal elections and a person was so defined that

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[43] T. Kage, "War Measures Act – Japanese Canadian Experience" (Workshop on Immigration and Security Our Voices, Our Strategies: Asian Canadians Against Racism, June 7-9, 2002, University of British Columbia). See also Salhany, *supra*, note 23 at 65 and Adachi, *ibid.*

[44] "The War Years and Beyond Years of Sorrow and Shame (1941-1949)", accessed online at www.japanesecanadianhistory.net/overview/part2.htm. See also Adachi, *ibid.* c. 9-14.

[45] Kage *supra*, note 43.

[46] Salhany *supra*, note 23 at 64-68.

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> Chinese and Mongolians were excluded. British Columbia went even further and passed legislation in 1895 denying the right to vote to all Orientals whether they were naturalized or Canadian born citizens... Even the courts could find nothing objectionable about these racist laws.[47]

Ultimately, the war and Japan's entry into it served as a convenient justification for injustices that may not have been possible under "normal" circumstances. National security served as a convenient cloak for garden-variety racism and the transformation of ethnic Japanese from "aliens" to "enemy aliens".[48]

Of particular relevance to the discussion in this paper was the use of the WMA to "deport" persons of Japanese ancestry to Japan. The Canadian government sought to send Canadian citizens of Japanese heritage and Japanese nationals to Japan if they "requested" repatriation.[49] Japanese Canadians who left Canada under this scheme would lose their citizenship. Again, citizenship did not appear to have much value where one was of "enemy nationality".

The Japanese community challenged these orders on the basis of division of powers arguments and other grounds. They alleged that the federal government was improperly exercising powers within provincial jurisdiction and as a result, the repatriation orders were

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[47] *Ibid.* at 65. Many were denied employment in public service, barred from the legal profession, and restrictions were placed on their participation in fishing industry.

[48] I highlight the term "aliens" because it demonstrates that even citizens were perceived as outsiders. This again exposes the substance of Canadian citizenship as being based on ethnicity rather than moral principles such as shared humanity or human dignity. Experience with the ATA, which will be discussed in Chapter 3, suggests that our understanding of citizenship is to some extent less as a common ethnicity and more as a set of shared principles. I would suggest that the reality of a diverse and multicultural society has to some extent effected this change in the conception of citizenship. Notwithstanding this improvement since the WMA era, the focus on Islamic terrorism as a unique threat has led to some distinctions arising between citizens. Profiling of Muslims in national security investigations is evidence of this.

[49] Keep in mind that these requests were effectively made under duress during internment. See Kage *supra*, note 43 at 4. A "repatriation survey" gave Japanese Canadians a choice: disperse east of the Rockies or go to Japan. See also Adachi *supra* note 39.

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invalid.[50] In *Co-Operative Committee on Japanese Canadians v. Attorney-General of Canada,*[51] the Judicial Committee of the Privy Council ("JCPC") rejected these claims, arguing that the executive has virtually unchecked power in an emergency. Despite the fact that the WMA orders were discriminatory, arbitrary and fundamentally unfair, the JCPC adopted a standard of heightened deference to the executive:

> Under the B.N.A. Act property and civil rights in the several Provinces are committed to the provincial Legislatures, but the Parliament of the Dominion in a sufficiently great emergency such as that arising out of war has the power to deal adequately with that emergency for the safety of the Dominion as a whole. *The interests of the Dominion are to be protected and it rests with the Parliament of the Dominion to protect them. What those interests are the Parliament of the Dominion must be left with considerable freedom to judge* ... it is not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embedded in the emergency legislation. Determination of the policy to be followed is exclusively a matter for the Parliament of the Dominion and those to whom it has delegated powers.[52]

This draws out the corollary issue discussed in this paper, which assesses the role of the judiciary in national security matters. As I suggest in Chapter 2, the Federal Court of Canada deals with the bulk of national security cases, especially for the purpose of this paper with respect to immigrants and refugees, and they have been largely deferential to executive action.

Judicial deference to the executive in national security matters carries with it significant risks for the rule of law and the constitutional structure. These risks were highlighted during the

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[50] There was no strong civil rights argument because there was no entrenched bill of rights or similar instrument to protect rights. However, one wonders how effective that would have been in any event given the United States Supreme Court's endorsement of the interment of Japanese Americans. See *Korematsu v. United States* 323 U.S. 214 (1944). The United States Supreme Court's decisions in *Hamdi* and *Rasul* are encouraging when contrasted with *Korematsu* because they have rejected, albeit in a very limited sense, Presidential authority to act without legal constraints because of war or emergency.

[51] [1947] 1D.L.R. 577 [hereinafter *Co-Operative Committee*].

[52] *Ibid.* at 585-586 (emphasis added).

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October Crisis, which led some commentators to suggest that judges had abandoned their responsibilities and allowed the executive to step into the judicial sphere.

The October Crisis

Prime Minister Trudeau's WMA Proclamation resulted in the enactment of the Public Order Regulations,[53] which began as follows:

> Whereas the Parliament of Canada continues to affirm that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law....[54]

However, reading further, one may have had serious doubts as to the sincerity of this affirmation. Among others, the PORs:

- made the FLQ an unlawful association;
- made members of the FLQ guilty of an indictable offence;
- criminalized assistance given to members of the FLQ;
- denied bail to detainees;
- allowed arrest without warrant;
- allowed search without warrant; and
- allowed detention without charge.

By any analysis, the PORs violated a number of individual rights, including many otherwise protected by the *Canadian Bill of Rights*[55]. However, the October Crisis revealed a crucial

[53] Later the *Public Order (Temporary Measures) Act*, S.C. 1970, c.2, which derived its authority from s. 3(1) of the WMA.
[54] Public Order Regulations, 1970, SOR/70-444, 104 Canada Gazette (Part II) 1128, October 16, 1970 [hereinafter PORs].
[55] S.C. 1960, c. 44 [hereinafter CBR].

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flaw in that legislation: section 2 of the CBR allowed a statute to be exempt from the CBR's requirements where such intent is explicitly expressed.[56]

Almost 500 people were detained under the authority of the WMA Proclamation and PORs. Few were eventually charged with any offence and less than 12 were convicted.[57] The PORs illustrate valuable lessons about the role of courts, and the legality-policy dichotomy, discussed below.

Role of Courts, the Separation of Powers and the Rule of Law

Noel Lyon, writing on the constitutional validity of sections 3 and 4 of the PORs,[58] sought to determine if "the emergency powers were exercised in terms of constitutional principles, in particular the rule of law."[59] In reiterating the essence of the principle of the rule of law, he wrote:

> If we are committed by our constitution to the rule of law, then Parliament and the Federal executive are under the law, and the important question we now face is the extent to which the courts have a constitutional responsibility to police legislative and executive violations of the rule of law.[60]

The rule of law is a fundamental principle in our legal system; it means that no person or institution, including the institutions of state, is above the law.[61] It also embodies certain principles, derived from fundamental moral precepts, against which the exercise of power is tested to ensure legitimacy and justice. These principles include fairness, equality,

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[56] *Ibid.* The WMA suspended operation of the CBR.

[57] Salhany, *supra*, note 23 at 70.

[58] PORs, *supra*, note 54.

[59] N. Lyon, "Constitutional Validity of Sections 3 and 4 of the Public Order Regulations, 1970" (1972) 18 McGill L.J. 136.

[60] *Ibid.* at 136

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transparency, impartiality, independence, accountability and justification. Therefore, with respect to the state, the rule of law requires government officials to act in accordance with these principles. The rule of law is much more than a positivist compliance with rules validly passed by a legislature – it is fidelity to the most basic moral principles that order and give meaning to society.

In the *Secession Reference*, the Supreme Court of Canada described the essential elements of the rule of law in the following terms:

> The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis* … is "a fundamental postulate of our constitutional structure". As we noted in the Patriation Reference … "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.[62]

Eugene Forsey further elaborated on the foundation of the rule of law as follows:

> everyone is subject to the law; that no one no matter how important or powerful, is above the law – not the government; not the Prime Minister, or any other Minister; not the Queen or the Governor General or any Lieutenant-Governor; not the most powerful bureaucrat; not the armed forces; not Parliament itself or any provincial legislature…. If anyone were above the law, none of our liberties would be safe.[63]

Most important, for the discussion in this paper, the rule of law can be encapsulated in the following ideas: (i) the executive is accountable; (ii) there is one law for all; and (iii)

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[61] Its importance is indicated in the preamble to the *Charter*, which states "Canada is founded upon principles that recognize the supremacy of God and the *rule of law*." (emphasis added)

[62] *Reference re Secession of Quebec*, [1998] 2 S.C.R. at para. 70.

[63] E. Forsey, "How Canadians Govern Themselves", Ottawa, Public Information Office House of Commons; accessed at www.Parl.gc.ca/information/library/idb/forsey/rulelaw-e.htm.

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individuals are shielded from arbitrary state action. In many ways, the rule of law is manifested in the separation of powers and the independence of the judiciary. Because the executive is not beyond the law it must be held accountable before an independent and impartial judiciary for its acts and omissions. And, accountability is measured by transparency, openness and the process of justification, which ensure that the exercise of power is consistent with known criteria, standards and fundamental values.

For Lyon, the judiciary is crucial to sustaining the rule of law, especially where executive action is concerned. In particular, judges have a duty to oversee the powers of governments under the Constitution. However, his conception of the role of courts is more expansive than simply being a jurisdictional referee between the federal and provincial governments; courts are a check or safety valve against any exercise of arbitrary or discriminatory power by government.[64] The legislature also plays an important constitutional role in this regard. But, given the nature of the parliamentary system, especially where majority governments prevail, the protections afforded by political checks may be insufficient.[65]

The *British North America Act*[66] created a judicial system "free from legislative and executive interference in performing the vital functions that only judges can be trusted to perform if the rule of law is to be maintained."[67] Under Lyon's thesis, the rule of law is violated where other institutions of state perform the judge's work.[68] Therefore, where

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[64] Lyon, *supra*, note 59 at 137.

[65] The American model has stronger political checks in the separation of the executive from the legislature. However, it is arguable that even in that case the political checks are muted where national security comes into play.

[66] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3 [hereinafter BNA Act].

[67] Lyon, *supra*, note 54 at 138.

[68] Section 96 of the BNA Act, *supra*, note 66, establishes the role of the judiciary.

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judges are not allowed to exercise their power, the fundamental constitutional framework risks being put out of balance.

The PORs usurped judicial functions and placed them in the hands of the executive branch. In particular, they "substituted executive judgment for judicial decision in areas so basic to judicial duty as to threaten the integrity of our constitution." Sections 3 and 4 of the PORs made it a criminal offence to be a member of the FLQ. Thus, simple membership in an organization became sufficient for a finding of guilt. When detainees were brought before courts, the role of the judge "was reduced to the role of timekeeper, keeping track of who attended what meetings and spoke or communicated what statements on behalf of an association. Criminal guilt was determined by executive decree."[69] Judges were removed from the constitutional equation and hence the rule of law came under attack. Without judicial supervision, the executive had free reign to use extraordinary measures.

Writing at a time when there was no explicit constitutional guarantee of individual rights, Lyon relied heavily on the authority of judges to police the division of powers under the BNA Act. This role as arbiter between the levels of government implied that judges played a more general role in checking executive power.

The checking role arises from the separation of powers, which requires the institutions of state – executive, legislative and judicial – to be separated in function and staff. While not explicitly pronounced, as is the case in the Constitution of the United States, Canada's constitutional structure does rest on a separation of powers structure. Indeed, because the

[69] Lyon, *supra*, note 59 at 140. According to Lyon "seditious libel" already existed in the criminal law, therefore ordinary law would have been sufficient to deal with the October Crisis while preserving the integrity and role of the judiciary in determining key elements of a criminal offence and hence guilt.

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legislature in Canada's parliamentary system plays a much more muted checking role compared to the United States Congress, the role of Canadian courts becomes even more important in maintaining the rule of law. Peter Russell explains:

> As far as executive-legislative relations are concerned, there is little room for the application of [the separation of powers] principle in Canada with a parliamentary-cabinet system of government in which the executive is headed by the leaders of the strongest party in the legislature. However, the principle applies much more to the judiciary and its relationship with the other branches of government. Clearly, the separation of powers is a corollary of judicial independence: the judiciary would not be independent if the primary judicial and executive functions were carried out by the same officials.[70]

Therefore, even prior to the introduction of the *Charter*, which entrenched the role of courts as a check,[71] the BNA Act carried within it the essential elements of the separation of powers and judicial independence. Judges exercised their checking power prior to the *Charter* through their role as referees under the division of powers. Issues involving individual rights could be framed in a division of powers context in order to give judges the opportunity to act.[72]

Does this mean that governments do not have recourse to emergency powers? Clearly, the executive may have valid reasons to resort to emergency powers in some cases. However, the exercise of those powers must be governed by the rule of law.[73] This means that judges

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[70] Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government*, (Toronto: McGraw-Hill Ryerson, 1987) at 89.

[71] *Charter, supra,* note 12, ss. 24 and 52.

[72] After the *Statute of Westminster, 1931* judicial review focused largely on issues of federalism. Therefore, even where issues of individual rights came into play, they were ancillary to the division of powers issues before the court. The *Charter* changed this by making the constitution supreme and thereby replacing federalism with constitutionalism as the central factor in judicial review. The *Charter* entrenched individual rights and the supremacy of the constitution and as a result also cemented the important role of courts in maintaining the constitutional state and protecting individual rights. See Russell, *supra*, note 70 at 93.

[73] Contrast this with Carl Schmitt's sovereign dictator, who possesses the exclusive authority to decide upon all elements of an exceptional or emergency situation. This leaves no room for other institutions of state to police

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must ensure that the exercise of executive power is justified and not exercised arbitrarily or in a discriminatory manner. For example, with respect to the PORs, judges should have determined guilt or innocence in accord with general prospective laws.

Legality-Policy Dichotomy

While the separation of powers lays down the roles and responsibilities of the institutions of state, it does not preclude the possibility that in an emergency some branches may require broader powers. Flexibility in this regard is limited by the rule of law. For Lyon, that means each branch may expand its authority when required, but only within the legitimate realm of its authority or competence.

> It is no doubt appropriate for the judiciary to defer to the executive and legislative branches of government on *questions of policy* and to do so increasingly in times of crisis. However, it is quite another matter for judges to identify themselves with government policy on *questions of legality*, and increasingly dangerous for them to do so in times of crisis when governments are tempted to ignore legality.[74]

This legality-policy dichotomy is useful in understanding the interaction of courts and the executive, especially in extraordinary circumstances. Lyon does not provide definitions of legality and policy. However, for our purposes legality would generally entail fairness, equality, and accountability.[75] Policy on the other hand can be described as the goals and

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or oversee the exercise of executive power. Schmitt famously summarized his concept of emergency powers with the phrase: "sovereign is he who decides upon the exception." See C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. G. Schwab (Cambridge: The MIT Press, 1988).

[74] Lyon, *supra*, note 59 at 144 (emphasis added). It might be useful to conceive of the boundaries of policy as being fluid rather than fixed. While the constitution establishes particular policy responsibilities for provincial and federal governments, these boundaries may not apply in times of emergency. Therefore, governments may expand their scope of specific competence (*e.g.* federal government legislating on property and civil rights) as long as it still falls within their general competence (*i.e.* policy). Adjudication on the other hand is not within the competence of the legislature or executive and therefore, judges are uniquely empowered to determine how policy affects rights.

[75] These general categories encompass fundamental rights, justification and transparency, all of which are ultimately subsets of the rule of law. Shared humanity intersects with the rule of law by making the claim that

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programs designed to effect particular social, economic or political outcomes; policy is usually put into action through legislation. In many ways Lyon's dichotomy mirrors Dworkin's policy-principle concept, which asserts that where government policy affects rights, courts are required to ensure that the effects are consistent with moral principles.[76]

In times of emergency political leaders may act in order to protect society. First, decisions must be taken to identify the challenges at hand, set goals and develop strategies to achieve those goals, all of which are rightly within the purview of the political branches. Next, the executive must act to implement the strategies developed, and it is this operational function that will have an impact on individual and community rights and engage judicial scrutiny. The judicial role springs from the separation of powers and operates on the basis of the rule of law, which may be manifested explicitly through constitutional rights guarantees, or implicitly through, *inter alia*, principles of fairness, equality and accountability. Therefore, where the implementation of policy is inconsistent with the rule of law it should not stand.

Policy considerations will likely include majoritarian interests, political alliances, and issues of trade or strategic military interests. In this context, governments may seek to act in the name of making society safer without due regard to legality. On the other hand, judges ought to be focused exclusively on legality or principle. Therefore, where judges robustly apply legality, they assess policy implementation against the standards of the *Charter*, the principles of the adversarial process, standards of evidence, and accountability – all of which are important elements of the rule of law.

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all human beings are entitled to respect and dignity, and in particular to this discussion, they are all entitled to fundamental rights on an equal basis regardless of their particular distinctions.

[76] R. Dworkin, *Taking Rights Seriously*, (Cambridge: Harvard University Press, 1978) c.2 and S. Guest, *Ronald Dworkin*, (Stanford: Stanford University Press, 1991) at 60-69.

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The dichotomy carves out adequate space for both courts and the executive to operate within their respective constitutional realms of competency.[77] Moreover, given the rationale underlying the separation of powers, I suggest that the constitutional balance *requires* each branch to fully embrace its role and discharge its duty. Therefore, where any of the branches fail to play their role robustly the system may not operate effectively. Just as governments may be found to be acting outside their authority, or *ultra vires*, by acts of commission, it is also possible for courts to act unconstitutionally where they fail to exercise their authority through forbearance or omission.

While Lyon argued that the executive during the October Crisis had usurped a key judicial function – the determination of guilt – Herbert Marx asked a similar, but more fundamental question with respect to the Proclamation: is the government's proclamation of an apprehended insurrection conclusive proof of the matter and therefore beyond judicial scrutiny? This question also engages the legality-policy dichotomy because it explores the role of judges in requiring evidence and justification for government action.

In considering this issue, the Quebec Court of Appeal sustained the finding of guilt by the trial judge in a case involving two men detained during the October Crisis.[78] Relying on previous WMA cases, including *Co-Operative Committee*, the Court found that judges were not competent to examine the basis of the proclamation of a state of apprehended insurrection.[79] Under this jurisprudence judges ought to offer total deference to the executive with respect to the rationale and evidence underlying such a proclamation. The role of the

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[77] In an emergency governments may expand within the realm of their competence only. See *supra*, note 75.

[78] *Gagnon and Vallières v. The Queen* (1971), 14 C.R.N.S. 321.

[79] H. Marx, "The 'Apprehended Insurrection' of October 1970 and the Judicial Function" (1972) 7 U.B.C. L. Rev. 55 at 57.

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judge would simply be to receive and accept the proclamation at face value as evidence of the facts asserted. Marx argued that the Court's total deference approach was not even sustainable on the basis of the prior WMA cases. In fact, he suggests that those cases, while mandating high degrees of deference, nonetheless preserve the province of courts to examine whether there are grounds for such a proclamation in the first place.[80]

In Marx's view, the fundamental question before the courts during the October Crisis was:

> [w]hether the proclaiming of an emergency and the bringing into force of the War Measures Act was constitutionally valid. This would depend on whether there was in fact an emergency. If the proclamation was valid the Governor in Council would unquestionably have almost unlimited powers to make regulations. By failing to distinguish between the permissible scope of regulations made under the Act, and the constitutional power to bring the Act into effect in the first place, the Quebec judges have sterilized the courts in their essential function of judicial review.[81]

The WMA gave the federal government wide-ranging authority to encroach upon provincial jurisdiction. And, while this would normally be unconstitutional, it could be justified on a temporary basis as being required by extraordinary circumstances. While some deference may be required with regard to the policies adopted by the federal government and their impact on the division of powers, it is quite another matter to defer to what is essentially a question of evidence, something falling squarely within the realm of legality. The requirement by courts of proof and justification of an extraordinary state of affairs would serve to ensure at a basic level that there is an independent check on executive power.[82]

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[80] *Ibid.* For example, *Co-Operative Committee* implies that the government's proclamation of an emergency may be rebutted with evidence indicating that no emergency exists, or that it ceases to exist. See Lord Hoffmann's judgment in *UK Detentions*, where he argues that there is in fact no emergency to ground the derogation itself, which was the basis of a violation of rights, *supra*, note 17 at paras. 91-96.

[81] Marx, *supra*, note 79 at 58.

[82] *Ibid.* at 60-62.

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In absence of any judicial supervision of a WMA proclamation, the executive is free of any restraints on its power. Both the separation of powers and the rule of law are ignored in such a situation. Therefore, because judges abdicated their role of testing evidence during the October Crisis, the federal executive was free to operate as it saw fit.[83]

Judges could have adopted a more robust role during the October Crisis ensuring that executive authority, even where it was expanded for exceptional reasons, was properly supervised:

> In sum, the judicial function with respect to the War Measures Act was to investigate whether or not an emergency had arisen – and if it had, to decide later whether the emergency had ended. Judicial investigation would have been useful as a method to discover what actually took place in October 1970, and a juridical definition of "apprehended insurrection" would serve well as a guide in the future if the government decides that such a situation again exists.[84]

While the executive had the authority to make policy decisions regarding threats posed to the nation by the FLQ, it was incumbent on judges to ensure that those decisions were consistent with the rule of law. In the case of the Proclamation, courts shrunk from their duty to test the executive's actions against the most basic standards of evidence.[85] Similarly, in the case of the Japanese and Ukrainians, courts could have applied principles of legality, especially with respect to equality and justification, to ensure that national security was not simply a cover

[83] Courts must determine reasonableness of measures and the emergency itself, for example, review of derogations under the *European Convention on Human Rights*, which was manifested in *UK Detentions*. The *Emergencies Act* model offers some oversight and limitation of extraordinary powers in the form of justification before Parliament and explicit time limits. The existence of section 33 of the *Charter*, *supra*, note 12, suggests that courts ought not defer to policy because governments may choose to avoid judicial scrutiny if they believe an extraordinary violation of rights is necessary and they are willing to be democratically accountable for their decision. The *Charter*'s override mechanism is similar to derogation and it comes with several advantages, including notice and temporal limits.

[84] Marx, *supra*, note 79 at 62.

[85] Judges could have tested the evidence underlying the declaration of emergency to determine if an emergency did in fact exist.

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for xenophobia. Judges could have insisted on standards of individual guilt in order to preserve the rule of law. Their failure to do so resulted in significant injustices and ultimately eroded the principle of shared humanity.

The October Crisis exposed the weakness of the CBR and highlighted the need for entrenched fundamental rights. This, coupled with other developments, led to the repatriation of the Constitution and the introduction of the *Charter*. With the embrace of the *Charter*, the Supreme Court of Canada gave early signs of affirming the integrity of the rule of law and the universality of rights. Notwithstanding these initial signals, however, strains began to develop in our commitment to protect fundamental rights and the rule of law. These strains were most pronounced where non-citizens and national security issues were intertwined.

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CHAPTER 2. The *Charter's* Blind Spot: Non-citizens and National Security

On a rainy day in April 1982, almost twelve years after he invoked the WMA, Prime Minister Trudeau sat on Parliament Hill with Queen Elizabeth II to sign the *Charter*. The introduction of the *Charter* represented a significant shift in Canada's legal-political culture. Canada changed from being a state founded on Parliamentary supremacy to one based on the supremacy of the Constitution; it became a constitutional democracy. Section 52 of the *Charter* explicitly established the supremacy of the Constitution, which cemented the judicial review role of courts and reiterated the fundamental premise of the rule of law: that all are subject to the law.

The 1980s also brought several other significant changes that would affect the power of government. Wrongdoing by the RCMP Security Service in the 1970s led to a *Commission of Inquiry Concerning Certain Activities of the RCMP* led by Justice David McDonald.[86] The McDonald Commission examined the RCMP's involvement in national security matters and determined that national security activities and law enforcement ought to be carried out separately. In addition, accountability and oversight of national security agencies was crucial.[87]

The WMA was repealed in 1985 and replaced with the *Emergencies Act*,[88] which was designed to be more comprehensive, structured and cognizant of the need for public accountability in exceptional situations. The *Emergencies Act* model differs from the WMA

[86] Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police: *Freedom and Security Under the Law (Second Report)* (Ottawa: Canadian Government Publishing Centre, 1981) (Chair: Justice D.C. McDonald) [hereinafter McDonald Commission].

[87] M.E. Beare, "Policing With a National Security Agenda" (Department of Canadian Heritage, February 2003) at 12-17.

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model of emergency law by creating different types of emergency, providing explicit time limits for the use of extraordinary powers and instituting mandatory parliamentary oversight and accountability.[89] This development was coincident with the growing momentum in the early 1980s for apology and redress for the injustices suffered by ethnic Japanese in Canada during World War Two and the coming into force of section 15, the equality provision, of the *Charter*.[90]

It was against this backdrop that judges enthusiastically adopted their enhanced role of judicial review under the *Charter*, fleshing out a process of justification for governmental action based on assessing the impact of a policy on fundamental rights.[91]

Of particular relevance to the discussion in this paper is the Supreme Court's 1985 decision in *Singh*, which held that refugees in Canada are entitled to *Charter* protection, including a comprehensive process to determine refugee status.[92] *Singh* set a progressive tone by suggesting that status or lack thereof should not determine the quality of fundamental justice that one is entitled to when subject to state action and in that sense it was a high water mark in articulating and protecting the principle of shared humanity.[93]

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[88] *Supra,* note 11.

[89] There are four types of emergency corresponding with specific time limits for the exercise of extraordinary powers. These categories are: (i) public order emergency – 30 days; (ii) international emergency – 60 days; (iii) public welfare emergency – 90 days; and (iv) war – 120 days.

[90] For a discussion on redress see R. Daniels, "Afterword", in Adachi, *supra*, note 39 at 371-377.

[91] *Oakes*, *supra*, note 13. The test is essentially a proportionality test, which is similar to that applied in the international human rights context. It assesses the rational connection of the measure used to realize the policy goal, ensures that rights are impaired only to the extent necessary, and measures whether the goal and effects on rights are proportionate.

[92] *Singh*, *supra*, note 14.

[93] Fundamental justice is not reserved for citizens exclusively or restricted to particular ethnic or religious groups. The basis of the right springs from fact of being human and reiterates the principle of shared humanity. The straightforward and simple language of the *Charter* guarantees fundamental justice to *everyone*.

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In the same year as *Singh* the Supreme Court found that so-called "political questions"[94] were subject to judicial review, and moreover, that executive action must be consistent with the *Charter*. In *Operation Dismantle*[95] various civil society groups alleged that the federal government's decision to allow cruise missile testing by the United States in Canada violated section 7 of the *Charter*.[96] The decision to allow testing involved issues of foreign policy, defence and national security, all of which were off limits for the judiciary under the traditional political questions doctrine.

While finding no sustainable cause of action in the claim, the Supreme Court held "that the executive branch of the Canadian government is duty bound to act in accordance with the dictates of the *Charter*."[97] Writing for the majority, Chief Justice Dickson went on to explain that: "disputes of a political or foreign policy nature may be properly cognizable by the courts."[98] Writing separately, Justice Wilson held not only that executive action is subject to the *Charter*, but also that it is incumbent on courts to supervise executive action where it engages rights:

> I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is decide whether any particular act of the executive violates the rights of citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.[99]

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[94] See P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 119-123 and 803-805. The political questions doctrine suggests that judges are not properly situated to adjudicate on political issues or decisions, for example war, foreign affairs or national security.

[95] *Operation Dismantle*, *supra*, note 14.

[96] *Supra*, note 12. Section 7 protects "life, liberty and security of the person".

[97] *Operation Dismantle*, *supra*, note 14 at para. 28.

[98] *Ibid.*at para. 38.

[99] *Ibid.*at para. 64.

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This approach resonates with the legality-policy dichotomy and suggests that judges are under a positive obligation to act, even where national security is in play.[100] It runs counter to traditional notions of judicial forbearance and restraint under the political questions doctrine and in that sense represents a significant transformation in Canadian jurisprudence. Using Lyon's language, even where sensitive questions of national security policy are in play, judges are not prohibited from ensuring that implementation of that policy is consistent with legality.

Despite these significant jurisprudential advances, the reality of dealing with perceived new threats to national security resulted in significant departures from the rule of law. This was most pronounced in the security provisions of Canada's immigration law, especially the security certificate process used to deal with suspected terrorists. Even though those provisions involve extraordinary measures, which test fundamental rights, erode basic fairness and allow discriminatory discretion to reign, Canadian courts have consistently sustained them as valid because they deal with national security. As a result, the security certificate process gives the executive a virtual free hand in dealing with its newfound enemies. In the discussion that follows, I will examine how non-citizens have been transformed into the ultimate menace to our security, thereby justifying the use against them of extraordinary measures operating outside the rule of law. In so doing, non-citizens have been effectively removed from the protective sphere of shared humanity as articulated in the *Charter*'s guarantee of fundamental human rights and equality.

[100] *Ibid.* at paras. 64 and 67.

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Refugees

During the late 1980s and 1990s, Canada began to receive increasing numbers of migrants, including refugees, from the developing world and they began to be portrayed as potential threats to Canadian society.[101] The non-citizen or migrant as threat has been a convenient vehicle for varying strains of xenophobic discourse in Canadian public policy; migrants have been transformed into opportunists, liars, criminals and now terrorists.[102]

As the Cold War wound to a close, terrorism replaced the spectre of communism as the primary threat motivating national security policy in the United States and by extension Canada.[103] And, because a significant number of migrants, especially refugees, came from the Muslim world, there was a conflation of migrant and terrorist.[104] Increasingly, a particular brand of terrorism – Islamic terrorism – began to be the face of the new enemy.

The structure and style of discourse during this period reflects the Cold War days, with the "free" world standing against a monolithic, one-dimensional foe who hates freedom and is intent on destroying *our* way of life. This discourse served the United States and its allies well during the Cold War by establishing a convenient foil to offset a complex policy agenda that in many ways had more to do with fostering military-economic interests than promoting

[101] R. Whitaker, "Refugee Policy after September 11: Not Much New", (2002) 20:4 Refuge 29. Refugee policy has traditionally fallen under the umbrella of national security; refugees are viewed at best as criminals and at worst as threats to security and Canadian values. See also A. Macklin, "Borderline Security", in Security of Freedom, *supra*, note 8 at 383 and S.J. Aiken, "Of Gods and Monsters: National Security and Canadian Refugee Policy", (2003) 14.2 Revue québécoise de droit international 1.

[102] Aiken, *ibid.* at 2-5.

[103] R. Freitas, "Human Security and Refugee Protection after September 11: A Reassessment", (2002) 20:4 Refuge 34 at 36.

[104] Aiken, *supra*, note 101 at 14.

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liberal political values.[105] The new enemy was to be found abroad, but they were also attempting to breach our borders and infiltrate our societies by posing as migrants, especially refugees.

Responding to this geo-political shift, Canadian governments began crafting policies and legislation to seek out and neutralize these threats. Despite the significant strides made during the 1980s toward developing a state based on the supremacy of the constitution, these policies and legislation, and most poignantly the jurisprudence that developed around them, stood as a stark anomaly. Because migrants were increasingly taking on the role of societal threat, this was most pronounced in cases involving non-citizens where national security, and hence terrorism, was implicated. Much of the jurisprudence in this regard comes from the Federal Court of Canada, which has jurisdiction over immigration and refugee matters. Overwhelmingly, that Court has accorded the highest degree of deference to the claims of the executive when national security is implicated:

> When the spectre of "terrorism" is conjured, government action tends to be endorsed in decisions that would otherwise be without legal foundation. Judicial deference in this regard can be viewed in terms of the judiciary's traditional reluctance to interfere in legislative or executive decisions when matters of national security are involved.... The judicial approach typically reflects an unwillingness to scrutinize the interests of national security against the competing values intrinsic to the rule of law and constitutional democracy.[106]

Echoing the political questions doctrine, the rationale offered in support of judicial deference is that issues of national security are properly left to those branches of government that are

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[105] See S.P. Huntington, *The Clash of Civilizations and the Remaking of the World Order*, (New York: Simon and Schuster, 1996).

[106] S.J. Aiken, "Manufacturing 'Terrorists': Refugees, National Security and Canadian Law", (2001) 19:4 Refuge 116 at 117. The Federal Court of Appeal's decision in *Charkaoui* and the Supreme Court's decision in *Suresh* are important examples of heightened deference on national security issues. These cases are discussed in more detail later in this chapter and in Chapters 3 and 4.

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expert in them; and, in any event, these issues involve political rather than legal determinations.[107] This rationale ignores *Operation Dismantle's* clear direction that all government action, regardless of character or subject matter, must comport with the Constitution and the rule of law. And, judges are uniquely and exclusively placed to make those assessments.

Suggesting that judges ought to deal only with "law" and not "politics" is fraught with danger for two reasons. First, when extrapolated to its ultimate end, this proposition can paralyze judges; it can be convincingly argued that every decision or dispute involving the state engages political issues; some are simply more manifest than others. Therefore, where the state is involved, legal issues will likely be interwoven with political issues. Second, where judges forbear or defer in cases involving politics they are not acting apolitically. Rather, their inaction carries with it a host of political consequences, most notably in legitimating government action.[108]

In any event, it is not unusual for Canadian courts to be involved with politically charged issues. Despite facing difficult policy questions, judges have grasped the legal issues that are embedded therein and attempted to apply principles of legality:

> Courts are frequently involved in balancing competing interests with explicit political, economic, and social dimensions. From foreign policy, missile testing, abortion, and the Secession Reference, to the language of signs, the funding of education and pay equity, the right to life and the right to death, Canadian courts directly engage with a broad spectrum of political issues and have attempted, albeit with varying degrees of success, to resolve these questions within the rubric of law and principle. Viewed in this light, judicial deference in the name of protecting Canada from "terrorism" reinforces the dominant discourses that have cast the refugee as a threat to

[107] See *Charkaoui, supra*, note 16, *Suresh, supra*, note *20* and *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47 [hereinafter *Rehman*], which coincided with the events of September 11, 2001.

[108] Similar to the weakness in the positivists' argument that judges are neutral where they are not active.

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> order...The Court's surrender becomes a political act of state legitimation, compromising the very tenets judges are entrusted to uphold.[109]

Where judges defer to executive decisions on matters of legality they step away from the rule of law. This departure from the rule of law can be of varying degrees. For example at its most extreme, the PORs removed judicial participation entirely from determining key elements of a criminal offence, thereby placing the executive in the judge's shoes.[110] The security certificate process is an extreme departure from the rule of law for similar reasons and I explore this proposition in the discussion that follows in this chapter. Where non-citizens are alleged to be national security threats, legality takes a back seat to policy. Fundamental principles of fairness, equality and accountability are consistently ignored, thereby eroding the principle of shared humanity because the protection of fundamental human rights is predicated simply on status rather than on human dignity.

Security Certificates

The legislative scheme designed to deal with the threats posed to national security by non-citizens is found in the IRPA.[111] While the roots of the current legislation go back to the 1970s, the conflation of terrorism with migrants as a primary threat coincides with the decline of the communist threat. It is telling that when the government of Prime Minister Brian Mulroney amended the *Immigration Act* in 1992 to respond to terrorist threats they also

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[109] Aiken, *supra*, note 106 at 123.

[110] In the case of the PORs the loss of judicial authority was a result of the executive usurping that authority through legislation. On the other hand, where judges voluntarily defer, the loss of judicial authority can be described more as abdication of responsibility.

[111] IRPA, *supra*, note 10, Division 9 (ss. 76–87).

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renamed and reorganized the immigration department into the new Department of Public Security.[112]

This period also marked a jurisprudential shift that created a status-based distinction for the assessment of fundamental rights. While *Singh* represented a high water mark on a number of levels, most notably the principle of shared humanity, the Supreme Court subsequently stepped away from that principle by finding that *Charter* rights are delineated on the basis of citizenship status. In *Canada (Minister of Employment and Immigration) v. Chiarelli*, a decision dealing with the deportation of a permanent resident convicted of a serious criminal offence, the Supreme Court unanimously found that the "most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country."[113] Leveraging the fear of the outsider to justify this finding, Justice Sopinka, writing for the Court, cited Justice La Forest's assertion in *Kindler v. Canada (Minister of Justice)* that without such authority to control migration "Canada could become a haven for criminals and others whom we legitimately do not wish to have among us."[114]

The IRPA was passed in 2001, but it maintained the general mechanisms of the previous legislation where terrorism was concerned.[115] The current legislation and previous iterations of the immigration law allow the executive to declare a non-citizen inadmissible to Canada

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[112] S. Aiken, Comments on Bill C11 Related to National Security and Terrorism Submission to House of Commons Standing Committee on Citizenship and Immigration (26 March 2001) accessed online at www.web.net/~ccr/crsbrief.htm.

[113] [1992] 1 S.C.R. 711 at 733 [hereinafter *Chiarelli*].

[114] *Ibid.* at 733. *Kindler* cited to [1991] 2 S.C.R. 779 at 834. Certainly, states have the sovereign right to control migration and distinguish the rights of non-citizens in some cases, for example with respect to voting or other rights contingent upon citizenship. However, fundamental justice is guaranteed to *everyone* by virtue of section 7 of the *Charter*. Therefore, even if non-citizens are treated differently because they are subject to removal and citizens are not, that distinction does not logically extend to a differentiation in process and fairness on the basis of status. Contrast *Chiarelli* with *UK Detentions*.

[115] A. Macklin, "Mr. Suresh and the Evil Twin" (2002) 20:4 Refuge 15 at 21.

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on "security grounds",[116] with the most salient ground being association with a terrorist group or participation in terrorist activities.

The process leading to inadmissibility and ultimate deportation involves a number of discretionary decisions made by the executive. The first step involves the Minister of Immigration and the Solicitor General issuing a certificate declaring the person inadmissible as a security threat.[117] The so-called "security certificate" can be based on a variety of information provided by security agencies like the Canadian Security Intelligence Service ("CSIS"), alleging that the non-citizen is a threat to Canada's security. Once the certificate has been issued it is filed with specially designated judges[118] of the Federal Court to determine whether the Ministers' decision was "reasonable".[119] Such a process strictly limits the scope of judicial review to determining only whether the Ministers' decision to issue a certificate was reasonable in light of the information before them. The designated judge does not test the evidence or the merits of the allegations against the detainee, and is not empowered to adduce additional information that ought to have been before the Ministers.

Foreign nationals are automatically detained once a certificate is issued,[120] and all refugee claims are suspended.[121] The designated judge reviewing the material supporting the

[116] IRPA, *supra*, note 10, s. 34. See also Canadian Council of Refugees, "Refugees and Security" (February 2003) at para. 7.5, which suggests "certain ethnic or national groups are particularly apt to be targeted for extra security checks". Amnesty International has condemned the security certificate process as offending fundamental rights, such as to a fair trial, as well as Canada's international obligations with respect to the prohibition of torture. See Amnesty International (Canada), "Above All Else: A Human Rights Agenda for Canada" (December 2004) accessed online at www.amnesty.ca.

[117] IRPA, *supra*, note 10, s. 77.

[118] I*bid*. s.76. Judges who are specially designated to hear national security cases.

[119] *Ibid*. s. 80.

[120] *Ibid*. s. 82(2). Permanent residents are detained pursuant to a warrant. *Ibid*. s. 82(1).

[121] *Ibid*. s. 77(2).

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certificate may accept any information even if it is not ordinarily admissible as evidence.[122] Most importantly, much of the substance of the review is held *ex parte*. If the certificate is found to be reasonable, deportation proceedings are commenced.[123]

This process raises significant concerns about the integrity of the rule of law and the role of courts. In particular, concerns arise in connection with:

- the use of *ex parte* proceedings and secret evidence;
- indefinite detention without charge;
- prohibition of membership and association; and
- the use of questionable information as evidence.

Secrecy

The crux of the problem with security certificates is the fact that *ex parte* proceedings[124] and secret evidence dominate key parts of the process.[125] These aspects raise concerns about the integrity of the principles of legality, and about placing judges in situations where they are unwilling or unable to discharge their constitutional role. The IRPA requires judges to determine the "reasonableness" of security certificates issued by the Minister while the information supporting the certificate is usually deemed sensitive for national security

[122] *Ibid.* s. 76, includes "security or criminal intelligence information that is obtained in confidence from a source in Canada, from the government of a foreign state, from an international organization of states or from an institution of either of them."

[123] See generally I. Leigh, "Secret Proceedings in Canada" (1996) 34 Osgoode Hall L.J. 113. See also, Macklin, *supra*, note 115 at 18-19. The procedure outlined in IRPA regarding security certificates and approved by the Supreme Court of Canada in *Suresh* has generally approved the indefinite detention of some individuals. Writing after the events of September 11, 2001 the Court clearly displayed a heightened level of deference to the executive in matters of national security. See also Aiken, *supra*, note 101 at 31 on concerns by the Inter American Commission on Human Rights on Canada's security certificate procedure.

[124] The detainee and his counsel are excluded from the review of security information. Instead, the judge sits alone with CSIS agents and government counsel to determine what, if any, information may be disclosed to the detainee.

[125] IRPA, *supra*, note 10, s. 78(e).

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reasons. Reviewing for "reasonableness" suggests that the standards of evidence will be significantly lowered in these types of proceedings.[126]

Under this scenario, the judge sits with the "evidence", or more accurately information, and determines whether the certificate is "reasonable". The judge is not able to assess the merits of the government's claim, the sufficiency of evidence, or whether any other information should also have been before the Ministers.

One can expect that the culture, language and institutional biases of the security agencies imbue such information with a particular worldview and sense of urgency.[127] Therefore, without the benefit of the adversarial process, it is not clear whether this information is, or even can be, tested in a robust and rigorous manner. Because they are not advocates, judges are neither sufficiently expert in national security intelligence matters to ask appropriate and probative questions, nor are they sufficiently apprised of the person's case to mount a credible challenge to the government's allegations. Pulled along by institutional momentum, judges may become captives of the security agency bureaucracy, ultimately adopting their worldview, biases and the security culture.

> The danger in using designated judges in conjunction with the *ex parte* hearing provisions is that the judges involved may become over-familiar with and over-respectful of the types of arguments used to justify security decisions. The tendency of intelligence services to make decisions affecting

[126] *Ibid.* ss. 33 and 80. Requires only "reasonable grounds to believe" an individual is a security risk and reviews the Ministers' decision to determine only if it is "reasonable". This means that the judge is not able to determine if the Ministers are correct or justified on the merits to effect detention. Rather, it is a narrow review of whether the Ministers' finding is supported based only on the information provided to the Ministers by CSIS. This process is somewhat circular and self-fulfilling in its outcome. In effect, the Ministers' must disregard their own intelligence information and policy objectives in order to be found "unreasonable". See also, Aiken, *supra*, note 101 at 24-26.

[127] Most institutions have their biases and worldview, but in this case it is compounded by the culture of secrecy that is associated with security agencies and the fact that the proceedings are held *ex parte*. The closed nature creates an intense environment where groupthink makes it easy for judges to adopt the ethos of the national security bureaucracy.

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> individuals according to quite low levels of probability is one reason the debate over probability and proof in relation to the refugee cases is important.[128]

Despite these concerns the Federal Court of Appeal apparently sees no risk to the adversarial process or the role of the judge under the IRPA security regime. In fact, Chief Justice Richard wholeheartedly endorses the regime as one that preserves the "role of the judiciary as interpreter of the law and defender of the Constitution."[129]

Security certificates raise concerns similar to those raised by Herbert Marx and Noel Lyon with respect to the October Crisis. Given the conditions and standards under which they are reviewed, security certificates effectively become *de facto* proof of what they assert.[130] Therefore, the security certificate erodes the judge's role in determining key elements of an offence, fundamental facts or evidence. Making matters worse, the subject of the security certificate is effectively denied an opportunity to test the executive's claims. As a result, the security certificate process creates a situation where executive policy decisions become legal determinations.

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[128] Leigh, *supra*, note 123 at 159.

[129] *Charkaoui*, *supra*, note 16 at para. 152. In *Re Charkaoui* 2003 FC 1419 [hereinafter *Charkaoui Trial*], Justice Simon Noel of the Federal Court Trial Division talks about the role of the judge in the security certificate process; to vet the secret evidence, provide a summary to the detainee and determine the reasonableness of the certificate. The process is purportedly designed to "balance the interests of the state and those of the person concerned...the designated judge [is] to assume an independent and objective role that takes the opposing interests into account." (at para. 97) But, given the role of the judge as a gatekeeper to protect the state's national security information it is difficult to see how this person can be objective in order to balance the interests of the state and the detained person. Forced to play two opposing roles at the same time it may easily create dissonance in judicial mind. Given the spectre of devastating consequences resulting from any mistakes the tendency is to err on the side of caution. As Justice Noel suggests, "[t]he security of Canada, the safety of its citizens and the protection of its democratic system are at stake." (at para 127) This is a fairly difficult presumption to overcome, especially when the detainee is not in the room to defend himself. Also see, Beare, *supra*, note 87 at 5: "The secret nature of security intelligence means that we must usually believe the facts, which are not shared with us, are as compelling as we are told."

[130] IRPA, *supra*, note 10, s.81.

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Admittedly, defining the proper role of judges and the executive in matters of national security involves a delicate balance. I suggest that the constitutional balance, especially under the *Charter's* justification process, strikes that balance properly. Under that model, judges do not encroach on policymaking but rather, they ensure that all policy implementation is consistent with fundamental values.[131] I further suggest that the legality-policy dichotomy accurately and appropriately demarcates the respective roles of the judiciary and executive under that process.

While there may be instances where sensitive information may need to be protected from disclosure, attempting to place judges in the role of an advocate is not an effective solution. I discuss the judicial role and other options for dealing with sensitive information, while at the same time preserving the integrity of the adversarial process, at the end of this chapter.

The security certificate process tips the balance so far in favour of the executive that there is a risk of creating a vacuum of legality.[132] In *ex parte* proceedings the root of the dilemma is that evidence is not subjected to robust scrutiny and hence, detainees are denied the right to full answer and defence before an independent and impartial tribunal. This threatens not only specific rights of particular detainees but also erodes shared humanity because it

[131] For example, values embodied by the rule of law and the *Charter*, which ultimately flow from the moral principle of shared humanity. By following this approach judges would be holding government to account and testing policy against legality, while discharging their constitutional role as described by Justice Wilson in *Operation Dismantle, supra*, note 14. Where government's wish to opt out of this structure in exigent circumstances they ought to follow a derogation procedure, which is provided for both in international law and the *Charter*'s notwithstanding provision, section 33.

[132] See Dworkin, *supra*, note 1 and Cole, *supra*, note 1. Extreme examples of this can be seen in Guantanamo Bay and other detention centers, both known and unknown, used by the United States in the war on terror. As well, the cases of Essam Hamdi and Jose Padilla who have until recently been outside the reach of courts and hence, the law, vividly illustrate the vacuum of legality or principle. Various lower courts originally denied both Hamdi and Padilla's *habeas corpus* petitions on the basis of national security and political questions. With the United States Supreme Court denying Padilla's petition on the basis of a technicality. See *Hamdi, Padilla* and *Rasul, supra*, note 1.

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subjects non-citizens to extraordinary and, in my view, extralegal measures primarily on the basis of status.

Ex parte proceedings and secret evidence are *prima facie* contrary to the values of a constitutional democracy. State legitimacy, and moreover, legitimacy of executive action in a constitutional democracy is based on the principle of justification.[133] And, independent and impartial judges are crucial for justification to function. This means that the government must make its case publicly,[134] with evidence that can be tested against known and consistent standards before an independent and impartial adjudicator. The corollary to justification is full answer and defence; those subject to state action have a right to know and test the evidence against them in order to defend themselves in an open, fair and non-discriminatory process.

The adversarial process demands that judges be impartial regarding the issues before them. It is the job of the parties before the court to make their case as best they can in order to persuade the judge on the basis of evidence tested against known, consistent criteria. Therefore, the risk inherent in the security certificate process is that it creates conditions that allow the state to infringe on fundamental human rights in a way that is not only unjustifiable constitutionally, but also unjustifiable under the principle of shared humanity.

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[133] *Charter, supra,* note 12, s. 1. The government must justify infringements against rights based on the tests outlined in *Oakes*, *supra*, note13. See *supra*, note 91 for a brief description of the *Oakes* test. See also Hogg, *supra*, note 94 at 866-885.

[134] Where the proceedings are required to be closed, it is important to ensure that the detainee continues to have the ability to challenge evidence and mount a meaningful defence.

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Indefinite Detention

Once a security certificate is filed, the IRPA mandates automatic detention for foreign citizens and detention on a Minister's warrant for permanent residents.[135] Although there is provision for detention reviews, in practice detention under a security certificate is virtually indefinite because the government may be unwilling or unable to deport the detainee.[136] In some cases individuals have been held in detention for almost a decade.[137]

Tactically, this form of detention is useful not only for the ostensible reason of public protection, but also as a crude method to obtain information or expedite removal.[138] The prospect of a long detention clouded in secrecy may be enough for the detainee to leave Canada "voluntarily". Currently, six men, all except one being Muslim Arabs are held on security certificates with allegations of terrorism.[139]

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[135] IRPA, *supra*, note 10, s. 82.

[136] Once the certificate is filed detention reviews are basically perfunctory. None of the security certificate detainees have been released, except Mahmoud Jaballah, who has since been detained on a new certificate. See *Canada (Minister of Citizenship and Immigration) v. Jaballah* [1999] F.C.J. No. 1681 [hereinafter *Jaballah*]. One bar to deportation was the risk of torture, which *Suresh* has put into question. In *UK Detentions* the House of Lords reaffirmed the principle against deportation to torture and found that the United Kingdom's certificate procedure amounted to indefinite detention because deportation was not realistic despite the government's argument that the detainees' prison had only "three walls", which suggested the detainees were free to leave the UK at any time. See *supra*, note 17 at paras. 81, 123, 173-174 and 212. The reality being that the risk of torture, especially given the stigma of being labeled a terrorist, eliminated any real opportunity to leave the UK thereby making their detention indefinite. In that case, 8 of the 9 Law Lords found the United Kingdom's security certificate-type process incompatible with the *Human Rights Act* (U.K.), 1998, c. 42, which imports the *European Convention on Human Rights* into domestic law. See *Chahal v. United Kingdom (1996) 23 EHRR 413* [hereinafter *Chahal*] a decision of the European Court of Human Rights for the proposition that deportation to torture is fundamentally unjust, even where national security is implicated, and contrast with *Suresh*.

[137] Mansour Ahani was detained in 1993. Ahani was returned to Iran in June 2002; his whereabouts and condition are unknown. See *Ahani v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 2 [hereinafter *Ahani*].

[138] Also used as a method to harass or possibly punish those with vulnerable status who refuse to co-operate with security agencies, for example where refugees refuse to monitor and report on community or religious organizations on behalf of security agencies.

[139] M. Shephard, "Branded as terrorist threat men languish in Toronto jail" *Toronto Star* (17 July 2004) 1. The men are Mahmoud Jaballah, detained February 1999 and August 2001; Mohamed Mahjoub, detained June 2000; Mohamed Harkat, detained December 2000; Hassan Almrei, detained October 2001;and Adil Charkaoui detained May 2003.

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Mahmoud Jaballah has been detained twice on security certificates. While the original certificate was held to be unreasonable in 1999,[140] the government tried again and he was detained in 2001 on similar allegations and information. The second certificate was judged to be reasonable by the Federal Court and Jaballah has remained in detention since then.

By any standard of the rule of law or *Charter* rights, this form of indefinite detention without charge violates fundamental human rights. However, the Federal Court and Supreme Court have consistently approved it.[141]

While detention reviews are provided for, as discussed earlier secrecy prevents the detainee and counsel from seeing much or any of the relevant information relied upon to justify the detention. Therefore, those reviews are perfunctory at best. Legality is offended because the detainee is denied a reasonable opportunity to rebut the government's claims by testing the "evidence" against known and objective standards before an impartial and independent tribunal.[142]

What we know about the security certificate process paints a troubling picture: secret information that is tinged with political biases, prejudices and priorities is used to brand non-citizens as threats to national security and thereby detain them indefinitely. The consequences are devastating for detainees, their families and the vulnerable communities from which they come.

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[140] *Jaballah, supra*, note 136. This is the only security certificate to have been quashed.

[141] *Chiarelli* contrasts with *Singh* to demonstrate a shift in the position of the Supreme Court regarding non-citizens. As well, *Suresh* sustained the security certificate process as valid and offered significant deference to the executive on national security matters. These decisions indicate a significant movement away from the principle of shared humanity that appeared to be taking hold in the early *Charter* jurisprudence of the Court.

[142] This material is not subject to ordinary evidentiary standards. In fact, virtually any information or allegations proffered by the security agencies may suffice as "evidence".

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The fact that virtually all of the security certificate detainees are Muslim also raises concerns about the discriminatory application of national security policy and law.[143] This vividly demonstrates how national security policy can infect law and eventually erode fundamental rights based on shared humanity.

Membership

The IRPA grounds for inadmissibility include "security"[144], which encompasses "engaging in terrorism", being a member of an organization that "engages, has engaged, or will engage" in terrorism, or "being a danger to the security of Canada". None of these terms are defined in the legislation, and as a result they are given content through executive discretion. As Audrey Macklin explains, discretion is layered upon discretion in the IRPA security certificate procedure.[145] This is problematic in terms of legality because key determinants in a decision that ultimately affects significant rights, including liberty and security of the person, are uncertain and have the potential of being applied inconsistently and in a discriminatory fashion.[146] Despite these grave shortcomings the Supreme Court and Federal Court have found that these types of vague terms are not inconsistent with the *Charter*.

In *Re Ahani*,[147] Justice Denault found that although key terms, like "member", were not defined they were nonetheless valid even if they may be discriminatory in their implementation:

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[143] Shared humanity is offended by discriminating unfairly on two grounds: (i) status; and (ii) faith.

[144] IRPA, *supra*, note 10, s. 34. More generally, see IRPA Division 4: Inadmissibility for a list of grounds.

[145] Macklin, *supra*, note 115 at 18: "The path to *refouling* a refugee is paved with a series of discretionary rulings by the Minister."

[146] See "Refugees and Security, *supra*, note 116. The composition of current detainees speaks to that fact. And, because "terrorism" is politically charged and misused by many governments to brand opponents, Canada may become a subcontractor in the repression enterprises of unsavoury regimes.

[147] [1998] F.C.J. No. 507, cited in Aiken, *supra*, note 106 at 121.

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> In my view, since Parliament has decided not to define these terms, it is not incumbent upon this Court to define them...I do not share the view that the word ["member"] must be narrowly interpreted. I am rather of the view that it must receive a broad and unrestricted interpretation.[148]

This approach is problematic for two reasons. First, it allows vague terms to be used even where they may result in discriminatory treatment, which is contrary to legality and the *Charter*. Second, it is a flawed judicial approach to addressing vague terms. Where such terms are not struck down for being unclear they should at best be read narrowly in order to limit or avoid discriminatory or other adverse impacts.[149]

Therefore, membership in terrorist organizations is prohibited even though membership is not defined in the IRPA. It is possible that the Ministers and their delegates may define "membership" differently in different cases. Because this discretion to determine membership on a case by case basis is unfettered by the IRPA it is likely that political biases will lead to selective, discriminatory and unfair determinations of inadmissibility, thereby further compounding the assault on shared humanity.

Security training for immigration staff sheds light on what criteria may inform the exercise of discretion regarding inadmissibility on security grounds. Some of the relevant factors that should be considered by immigration staff when determining membership in a terrorist organization include:

- contributing money to the organization;
- associating with members of the organization;
- participating in lawful activities of the organization;

[148] Aiken, *ibid.* at 122

[149] Aiken, *supra*, note 101 at 22-31.

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- attending meetings of the organization; and
- distributing the organization's literature.[150]

This approach is simplistic because it ignores the fact that many groups deemed to be terrorist are not one-dimensional. In some cases the organizations in question are large and complex, and those involved with it may not participate in, facilitate or advocate any form of violence. Many people may be involved in a wide variety of activities, including humanitarian assistance, economic development and political advocacy, without having any links to violent activity, legitimate or otherwise.[151] Prohibiting membership in those cases is simply unfair because it robs individuals and communities of important associational opportunities.[152]

Legality requires judges in this instance either to refuse to apply vague terms or give them substance and parameters by reading content into them. In this way, judges can ensure that the pursuit of national security is consistent with fundamental values and hence, subject to the rule of law.

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[150] Cited in "Refugees and Security, *supra*, note 116 at para. 7.4.

[151] *Ibid.* at para. 7.3: "The concept of 'terrorist organizations' is also highly problematic, because many organizations which undertake violent actions are multi-faceted, undertaking many non-violent activities. This is particularly true of organizations involved in liberation struggles." Aiken, *supra*, note 101 at 25-26 for a discussion of the complexities of liberation movements. Also see Aiken, *ibid.* at 23 which illustrates the lack of *mens rea* requirement in determining membership.

[152] See "Refugees and Security" *Ibid.* at para 5.6 and Aiken, *supra*, note 101 at 26. Associational life is important to participation, integration and comfort in society. This is especially true for newcomers to Canada. Chilling of associational life in particular communities (*e.g.*, Muslim communities) and their subsets (*i.e.*, newcomers and refugees) paralyzes them and distorts their growth, creating suspicion of the wider community and sowing inter-community mistrust. The Canadian Muslim community has experienced a chill on charitable work and giving here and abroad, which is especially important for newcomers and refugees who have dependents abroad. In addition, participation in public life may also be diminished because any association with controversy or politics may be deemed to be suspect.

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Part of the problem with "membership" lies in the lack of a definition for "terrorism". Again, the IRPA is silent. While the Supreme Court recently attempted to remedy this shortcoming by providing a definition of "terrorism", there remains significant room for error. The Supreme Court defined "terrorism" as:

> any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[153]

While this approach is more helpful than the traditional approach taken by the Federal Court, it remains quite broad. Coupled with wide discretion in application, the *Suresh* definition still leaves much room for selective and politicized determinations.

Politicized Evidence

While the particular information used in security certificate process is unknown because of national security secrecy, it is possible to get a sense of the nature of that information based on CSIS's publicly available institutional positions. As Canada's intelligence agency, CSIS provides information and intelligence to generate and support security certificates.

In the CSIS report, "Conflict Between and Within States", the agency identifies a number of negative global trends, including migratory pressures. This is especially relevant to a discussion of security certificates and their intersection with the larger theme of shared humanity because it perpetuates a perception that non-citizens pose significant threats to "our" security:

[153] *Suresh*, *supra*, note 20 at para. 98.

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> When the situation is desperate, others claim refugee status, posing the conundrum as to who is a legitimate refugee...The bottom line is that while the developed world prospers, much of the rest of the world is bedeviled by the disastrous consequences of armed conflict between ethnic and religious groups. The resultant tide of refugees, IDPs, and those living in humanitarian emergencies is too large to be absorbed easily, and there is no ready solution in sight.[154]

While this provides insight into our security agency's one-dimensional and somewhat pejorative view of refugees the report goes further, extrapolating threats of terrorism arising from distant conflicts.[155] Subjective language reveals institutional biases peppered with value judgments that likely form the basis of intelligence information intended to assist the executive in distinguishing the "good guys" from the "bad guys":

> Many of the 250 conflicts will not be resolved in a manner satisfactory to all parties. Winners normally will form the government, with intelligence and security forces to keep them in power; *losers will tend to form terrorist organizations to continue and export the struggle to the developed world* and strive to obtain the best publicity for their cause.[156]

By using an undifferentiated term such as "terrorist" to characterize particular parties in conflicts, CSIS ignores other forms of indiscriminate violence that are state-sponsored[157] and ignores the complexities of valid political struggles and their treatment under international

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[154] Canadian Security Intelligence Service, "Conflict Between and Within States", Report #2000/06 (August 8, 2000) at paras. 12-13.

[155] See Canadian Security Intelligence Service "Exploitation of Canada's Immigration System: An Overview of Security Intelligence Concerns", (July 1999), cited in Beare, *supra*, note 87 at 5. It warns of terrorist groups operating in Canada. This is often mentioned by hawkish security analysts and security pundits to reinforce claims of existential threats and the need for strong responses. Beare, *ibid.* at 5, notes that in popular discourse "[t]he benefits of immigration are juxtaposed against the alternative opinion – that sees the existence of ethnic communities as potential bases for terrorist activity or at least terrorist fund raising and financing."

[156] "Conflict Between and Within States" *supra*, note 154 at para. 14 (emphasis added).

[157] For example, violent acts carried out by military, paramilitary, police, and death squads. See N. Chomsky, *Pirates and Emperors, Old and New: International Terrorism in the Real World* (Cambridge: South End Press, 2002).

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law.[158] Clearly, the CSIS worldview is subjective, and not very nuanced.[159] At the end of the day, CSIS's work is not a neutral assessment of all possible threats to Canada, but only a subset containing those that align with our current political imperatives and foreign policy.

Judging National Security

For our purposes, the problem arises not in CSIS's defective intelligence itself, but in its influence on the implementation of policy and subsequent treatment by judges. The *ex parte* nature of the process compounds the problem, as I have suggested above. When judges apply legality to this type of information, by testing it rigorously and ensuring that its application does not violate rights or result in discriminatory effects, they ensure that the rule of law is sustained and executive action is accountable and justifiable.

Unfortunately, the security certificate jurisprudence suggests that courts have ceded legality to policy, leaving non-citizens in a rule of law vacuum where their rights and interests are at the mercy of the executive. While suggesting in one breath that the designated judge is a neutral arbiter who balances the interests of the executive and the detainee, Justice Noel of the Federal Court goes on to explain that "[i]n the areas of security and immigration, no one

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[158] For example, resistance and self-determination movements, such as the ANC in the 1970s and 1980s, which was regarded by the United States government as "terrorist". Without any robust objective checking and testing CSIS's opinion becomes conclusive.

[159] Canadian Security Intelligence Service, "Trends in Terrorism", Report #2000/01 (December 18, 1999) at para. 1, opens with the following: "The 22nd of July 1999, may have marked the thirty-first anniversary of modern international terrorism. On that date in 1968, three members of the Popular Front for the Liberation of Palestine (PFLP) hijacked an El Al Boeing 707, en route from Rome to Tel Aviv, carrying ten crew and 38 passengers. The aircraft was flown to Algiers' Dar al-Bayda Airport, where lengthy negotiations were undertaken for the eventual release of passengers, crew, aircraft and hijackers. The incident is widely regarded as a principal initiator of the deadly continuum of international terrorist attacks which have exerted significant political influence during the past three decades." Once again, the loaded label of terrorism, when selectively applied exposes the political biases that motivate Canada's security agencies. In the case of this report, while it is undeniable that Palestinians have engaged in terrorist activities it is equally true of the Israel's military, its political leaders and its settlers in the Occupied Territories. A more neutral standard would strip the act of violence of its particular motive or branding in order to achieve real security for Canadians. Anything less

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is better placed than the executive ... to make decisions resulting in inadmissibility."[160] In light of this level of respect for executive authority and discretion, one may be excused for thinking that some judges are "more executive minded than the executive."[161] The Federal Court of Appeal endorsed Justice Noel's approach in its unanimous decision in *Charkaoui*. While citing the importance of national security and the need for deference to the executive in such matters, the Court went on to justify the security certificate process in the context of the exigencies of national security:

> the protection of national security is not a caprice. It is a necessity for the purpose of protecting the social order which allows the exercise and development of the individual rights conferred by the Constitution, which we rightly cherish. We are satisfied that this necessity to protect national security can justify derogations from the system or process that normally prevails. We are also satisfied that the process established for the review of protected information, by which the Chief Justice of the Federal Court, or a judge he designates, examines the denial of access to that information, fulfills the minimum requirements of the principles of fundamental justice.[162]

It is interesting to note that the Court speaks of "derogations" while the IRPA regime exists and operates as ordinary law. The government has not invoked the *Charter's* derogation mechanism, section 33, in order to justify it as extraordinary and required for exigent circumstances. Rather, the IRPA regime is a "business as usual" model for non-citizens.

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serves only to introduce Canada into the disputes from which this violence arises. See also Aiken, *supra*, note 106 at 127-128.

[160] *Charkoui Trial*, *supra*, note 129 at para. 114.

[161] D. Dyzenhaus, "The Permanence of the Temporary: Can Emergency Powers be Normalized?", in Security of Freedom, *supra*, note 8 at 33.

[162] *Charkaoui*, *supra*, note 16 at para 122. The rationale at the beginning of this extract, which calls for the preservation of the "social order", carries shades of Cotler's "human security" device, which is discussed in more detail in Chapter 3.

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In rejecting the detainee's appeal, the Court embraced a positivist approach to adjudication. Designated judges reviewing security certificates are limited to applying Dworkin's "rule-book" concept of the rule of law, which the Court articulates as follows:

> The entire process of judicial review of decisions by government or federal agencies is limited to verifying the legality of these decisions, that is, verifying their compliance with the law. This does not entail an analysis of the merits or appropriateness of such decisions nor does it give the court or tribunal the power to make the decision that it considers best. If the decision was made in compliance with the law, the court or tribunal must respect it even though it would have preferred some other decision. Where it is not in compliance, the matter must be sent back for redetermination, this time in compliance with the dictates of the law. We are unable to see how this process compromises the independence and impartiality of the court or tribunal.[163]

This ignores the fundamental difference between legislation and law. Legislation may be any set of rules formally passed according to a particular procedure and having the weight of the state's coercive force behind it. Law, on the other hand, is much more because it consists of rules that are consistent with fundamental morality. The Court's fidelity simply to rules devoid of principle takes us to a place where law no longer rules.

Making Judges Uncomfortable

Applying the legality-policy dichotomy to the security certificate process leads one to conclude that, at a minimum, the appearance of legality and the separation of powers is non-existent. Judges are forced to play roles to which they are not suited: advocate, inquisitor and protector of national security. In this environment it becomes easy for them to defer to the executive. As a result, they cede their constitutional role to the executive, which is then free

[163] *Charkaoui, ibid.* at para. 70.

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to act outside of the rule of law. Worse, approval by the courts lends an air of legitimacy in the public eye to what is virtually unchecked executive action.[164]

Left untested against the standards of legality, the security certificate becomes conclusive proof that the detainee is a terrorist or other threat to national security.[165] As I have argued previously in this paper, in that sense the security certificate is similar to Prime Minister Trudeau's Proclamation and PORs, because it allows the executive to determine fundamental evidentiary elements, which according to Marx and Lyon are exclusively within the purview of courts in determining legality.[166] A better approach would be for the executive to make allegations that would be fully assessed and tested before a judge. Such an approach would more closely resemble a robust process of justification and be true to the requirements of the rule of law.

To justify its actions, legality requires the executive to proffer evidence that must meet known criteria if it is to be given any weight. While important parts of the security certificate review hearing are shrouded in secrecy, we do know that the rules of evidence do not apply because various types of intelligence material are accepted as evidence against the

[164] The government often boasts that security certificates are not unconstitutional because the courts, most notably the Federal Court, have overwhelmingly upheld them.

[165] See Aiken, *supra*, note 106 at 126: "In most cases, once an adverse CSIS report has been issued, even the most compelling testimony by the person concerned and Herculean efforts by counsel have been unable to persuade the Federal Court that the advice should be discounted. With each security certificate that the Court has upheld on the basis of "terrorism" allegations, the government's strategy of selective refugee deflection and deterrence, of closing the borders for some while extending a welcome mat to others, has been reinforced." See IRPA, *supra*, note 10, s. 81 (a): where a security certificate is found to be "reasonable" it then becomes "conclusive proof that the permanent resident or the foreign national named in it is inadmissible."

[166] Marx argued that the Proclamation under the WMA was a key trigger to a host of other actions. Similarly, the validity of the security certificate is a trigger to a variety of other consequences for the subject of the certificate: terrorist label, detention, and deportation.

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detainee.[167] Therefore, without explicit and objective standards of proof and coupled with *ex parte* proceedings, the judicial role becomes highly subjective. Ultimately, there may be as many standards of legality and justice as there are designated Federal Court judges.

Justice Hugessen of the Federal Court articulates many of these concerns in an interesting and somewhat disquieting critique of the security certificate process, most notably the use of secret proceedings:

> All national security functions which are laid on the Federal Court have this in common: they involve at one stage or another and sometimes throughout the piece a judge of the Court sitting alone in what are called hearings, but they are held in the absence of one of the parties...This is not a happy posture for a judge, and you are in fact looking at an unhappy camper when I tell you about this function...We do not like this process of having to sit alone hearing only one party and looking at the materials produced by only one party and having to try to figure out for ourselves what is wrong with the case that is being presented before us and having to try for ourselves to see how the witnesses that appear before us ought to be cross-examined.
>
> If there is one thing that I learned in my practice at the Bar, and I have managed to retain it through all these years, it is that good cross-examination requires really careful preparation and a good knowledge of your case. And by definition, judges do not do that. We do not get to prepare our cases because we do not have a case and we do not have any knowledge except what is given to us and when it is only given to us by one party we are not well suited to test the materials that are put before us. We hate hearing only one party. We hate having to decide what, if any, sensitive material can or should be conveyed to the other party. We hate, or I certainly do, I am not sure that everybody feels the same about this, sitting in a bunker, in a sealed windowless courtroom deep in the bowels of a building in Ottawa where the air is terrible, the only thing that is good is the coffee, but we hate it. I do not think it makes us do our job particularly well. We greatly miss, in short, our security blanket which is the adversary

[167] Intelligence information may come from repressive regimes, like Egypt, Syria or Algeria. This information may be the basis of detention thereby making Canada, *via* the IRPA, a partner in the repressive practices of those regimes wishing to silence dissenters abroad or in exile. The majority of the current security certificate detainees hail from the countries listed above.

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> system ... the real warranty that the outcome of what we do is going to be fair and just ... I sometimes feel a little bit like a fig leaf.[168]

Justice Hugessen's critique reveals firsthand how the security certificate process departs from the principles of legality. While they may try to ensure a semblance of legality, Federal Court judges hearing security certificate cases are often overwhelmed by the culture of security agencies and almost compelled to defer to the purportedly pressing needs of the executive.

In *Charkaoui Trial*, a challenge to a security certificate detention, Justice Noel describes the role of designated judges as a "cornerstone of the review procedure" because they balance national security interests and the rights of the individual.[169] However, in striking this balance, he justifies using a lower standard of scrutiny for national security information. Clearly that balance is weighted in favour of the executive's claims. He also provides an interesting glimpse into the extent that the prevailing culture and ethos of security agencies has crept into judicial thinking:

> Parliament has chosen standards other than the preponderance of evidence standard because this is what national security demands. Cases involving national security must be approached differently from others. In this case, the security of Canada, the safety of its citizens and the protection of its democratic system are at stake. The state must therefore use extraordinary methods of protection and inquiry.... Situations and entities that pose a threat to national security are often difficult to detect and are designed to strike where society is most vulnerable. Attacks against national security can have tragic consequences. People who pose a danger to national security are often on a "mission" for which they are prepared to die. They are difficult to identify and their borderless networks are often difficult to infiltrate. They strike when least expected. *Where national security is involved we must do everything possible to avert catastrophe. The emphasis*

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[168] J.K. Hugessen, "Watching the Watchers: Democratic Oversight", in D. Daubney, *et al.* eds, *Terrorism, Law & Democracy: How is Canada changing following September 11?* (Montreal: Canadian Institute for the Administration of Justice, 2002) at 384-386.

[169] *Charkaoui Trial*, *supra*, note 129 at para. 99.

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> *must be on prevention. After all, the security of the state and the public are at stake.* Once certain acts are perpetrated, it could be too late. In my opinion, national security is such an important interest that its protection warrants the use of standards other than the preponderance of evidence standard.[170]

This attitude paints a disturbing picture of a judiciary drifting from its constitutional role as protector of the rule of law and fundamental rights.[171] At the end of the day, non-citizens are subject to indefinite detention and deportation to possibly face torture and even death on the basis of questionable evidence tested in secret against lowered standards of evidence by judges who are highly respectful of executive interests on national security. In *Charkaoui* the Federal Court of Appeal reiterated much of the trial division's rationale, often revealing varying and sometimes competing conceptions of the judicial role. The Court cast the designated judge's role as a neutral arbiter to "assess...truthfulness, reliability and credibility"[172] of evidence, while also assisting the detainee in testing the validity and credibility of secret evidence.[173] Given these significant responsibilities, it is easy to understand why judges may be uncomfortable with their complicated and sometimes contradictory roles as arbiter, advocate and defender of national security, the social order and the Constitution.[174]

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[170] *Ibid.* at para. 127 (emphasis added).

[171] The views of Justices Hugessen and Noel also expose a dissonance in the judicial mind regarding the treatment of national security. Views range from significant trust in the executive to extreme discomfort with the process and neither one is healthy for promoting the rule of law.

[172] *Charkaoui, supra*, note 16 at para. 74.

[173] *Ibid.* at para. 82.

[174] *Ibid.* at paras. 122 and 152.

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The Supreme Court also endorsed a deferential stance on national security issues involving non-citizens in *Suresh*,[175] which was before the Court in May 2001 with the decision released in January 2002. The events of September 11, 2001 intersected not only the timeline of the Court's deliberations but also its rationale and mindset.[176]

Manickavasagam Suresh came to Canada as a refugee from Sri Lanka in 1990, following which he applied for permanent residence. In 1995 a security certificate was filed claiming that he was a security threat because he was a member of a terrorist organization, namely the Liberation Tigers of Tamil Elam ("LTTE").[177] The Federal Court sustained the security certificate on judicial review and subsequently the Minister issued a "danger opinion", which meant that Suresh was a danger to Canada's security and should be deported.[178]

Citing the deferential House of Lords decision in *Rehman*[179] approvingly, especially in light of the events of Sept 11, 2001, the Court noted that Parliament intended to grant "broad discretion" with respect to danger opinions. They are:

> reviewable only where the Minister makes a patently unreasonable decision. It is true that the question of whether a refugee constitutes a danger to the security of Canada relates to human rights and engages fundamental human interests. However, it is our view that a deferential standard of ministerial review will not prevent human rights issues from being fully addressed, provided proper procedural safeguards are in place and provided that any decision meets the constitutional requirements of the *Charter*.[180]

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[175] See *Suresh*, *supra*, note 20 at paras. 41 and 85. The case of Mansour Ahani was also dealt with by the Supreme Court but it did not attract similar attention because, as an Iranian accused of being a terrorist, he was not a sympathetic figure in the current political environment. See Macklin, *supra*, note 115.

[176] See *Suresh*, *ibid.* at paras. 3-5.

[177] Macklin, *supra*, note 115 at 16.

[178] *Suresh*, *supra*, note 20 at paras. 7-22. Macklin *ibid.*

[179] *Supra*, note 107.

[180] *Suresh*, *supra*, note 20 at para. 32.

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Despite the fact that much of the evidence involved in the Minister's decision is kept secret and the proceedings are *ex parte*, the Court determined that the highest level of deference was justified.[181] Arguably, the Court selected the highest level of deference because the case involved an administrative decision in a specialized area. In addition, I suggest that the political costs, both for courts and the government, are relatively low when the rights of non-citizens are degraded in favour of security needs.[182]

While administrative in nature, the security certificate regime differs from other types of administrative decisions in two important aspects. First, the process engages significant interests and an adverse determination may have devastating consequences compared to other administrative determinations. Second, unlike other administrative processes, the secret process is permanently closed with no expectation that any of the executive's claims, allegations or information will ever see the light of day and hence be subject to public scrutiny.

Both *Suresh* and *Charkaoui* place judges in a problematic position. How are they to carry out their duties in *ex parte* proceedings? Are they to sit as they would in open court: an impartial and independent reviewer of the evidence and the law? Or, are they to take an active and almost inquisitorial role to make up for the party not present? The Federal Court

[181] This standard is "patent unreasonableness". Courts will review a number of factors to determine the standard of review, including the right of appeal, the expertise of decision-maker, the purpose of legislation, and the nature of the question. However, this ignores the reality that in most administrative matters proceedings are not undertaken in secret and that the consequences do not involve detention without charge and the possibility of deportation to face torture. See *Suresh*, *ibid.* at para. 30.

[182] It may play into xenophobic strands in political and social discourse where traditionally centrist governments attempt to overtake rightist agendas. It is politically expedient because non-citizens are not able to exact any cost at the ballot box. However, it sets precedents socially, politically and jurisprudentially for diminishing shared humanity, which may well become a platform for eroding the rights of some citizens. Arguably, this is what the ATA begins to do. As well, the erosion of shared humanity in terms of legal rights also signals to society at large that shared humanity in a wide variety of other social, political and economic interactions in the private sphere may also be abandoned (*e.g.*, discrimination in employment or accommodation).

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of Appeal's response to these questions in *Charkaoui* was inconsistent at best and ultimately came down in favour of erring on the side of national security.

In my view, because they are *ex parte* proceedings involving significant liberty and personal security interests, a strict standard of review – rather than the current deferential stance – would be more appropriate.

The ultimate question boils down to this: who will protect fundamental rights and ensure that policy is consistent with legality and moral principle? If *Suresh* and *Charkaoui* are any indication, judges should place their trust in the executive and security agencies. While the Supreme Court asserts that a high level of deference "will not prevent human rights issues from being fully addressed",[183] it is not clear how this will be achieved if courts ought not to look with too much rigour into the evidence and claims supporting the executive's decisions.

Deference calls for reliance on the executive's expertise in a specialist area, in this case security and intelligence. The Supreme Court recognized that the assessment of national security threats is "highly fact-based and political"[184] and concluded that "a broad and flexible approach to national security" should be adopted. While the Minister is required to show "evidence" supporting national security decisions, it is unclear what standards and criteria are required of such evidence given the level of deference required of reviewing courts. Does this mean that any information will suffice as evidence? This is troubling because, as I have suggested previously in this chapter, the security certificate regime allows

[183] *Suresh*, *supra*, note 20 at para. 32.
[184] *Ibid.* at para. 85.

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materials to figure in the judge's determination that would not otherwise qualify as evidence.[185]

It is interesting to contrast the Supreme Court's position in *Suresh* with the House of Lord's decision in *UK Detentions*, which found the United Kingdom's security certificate-type process inconsistent with the UK *Human Rights Act*.[186] The Law Lords reiterated the prime importance of the rule of law and found that the government's approach to dealing with suspected terrorists through indefinite detention without charge was disproportionate and discriminatory, and therefore unjustified. With particular regard to the standard of review in these types of matters, Lord Hope of Craighead recognized the important role of the political branches in assessing threats to national security and crafting responses to them. However, he went on to note that:

> Where the rights of the individual are in issue the nature of the emergency must first be identified, and then compared with the effects on the individual of depriving him of those rights. In my opinion it is the proper function of the judiciary to subject the government's reasoning on these matters in this case to very close analysis.[187]

This approach to judicial review of national security is starkly different from the positivist rule-book approach taken in *Charkaoui*. The path adopted by the House of Lords is more robust and appreciates the importance of moral principles in ordering the law, and hence society, to effect just outcomes.

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[185] IRPA, *supra*, note 10, s. 78(j).

[186] *UK Detentions*, supra, note 17 at para. 223. Even though the UK government sought to derogate from the *Human Rights Act*, the Lords found the provisions unjustified. Contrast this with Canada, where no derogation has been sought under the IRPA.

[187] *Ibid.* at para. 116.

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Therefore, high levels of deference with respect to national security matters, when combined with secrecy, represent a danger not only to the immediate interests of the party at risk, but also to fundamental legal and liberal values as manifested in the principle of shared humanity. Important decisions about the rights of some groups and individuals are made, not on the basis of legality, but on the predilections of policy. When judges suggest that "[w]here national security is involved *we must do everything possible to avert catastrophe*" policy has clearly eclipsed legality.[188]

Judges Not Spies – A Way Forward

A more consistent approach to adjudication would be to apply the legality-policy or policy-principle dichotomies to the adjudication of all issues, including national security. This appreciates the executive's valid interests in developing national security policy and special access to intelligence material. However, it also recognizes that the executive is driven by motives that may not always consider the requirements of legality and moral principle. While subject to the rule of law, the executive is not possessed with the constitutional duty to ensure that the rule of law is applied and upheld. That role is entrusted exclusively to judges by virtue of the separation of powers and the *Charter*.

The House of Lords effectively gave life to this approach by vigorously testing the national security claims of the UK government's indefinite detention of foreign terrorist suspects purportedly for immigration reasons. Lord Bingham of Cornhill held that "excessive

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[188] *Charkaoui Trial*, *supra*, note 129 at para. 127 (emphasis added). This speaks to who "we" are in terms of the state (*i.e.*, judges and executive), but also suggests who matters in the polity. Non-citizens, and arguably some citizens, may not fit the definition of "we". As a result their rights are devalued and it becomes simpler in a utilitarian sense to sacrifice those rights in the interests of the larger community all the while being sold as sacrifices that "we" are willing to make. See Dworkin, *supra*, note 1 and Cole *supra*, note 1.

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deference" to executive decisions would "emasculate" the authority of the courts, especially "in a field involving indefinite detention without charge or trial."[189]

Legality requires judges to ensure that the implementation of policy and hence the decisions of the executive are consistent with principles such as fairness, equality and accountability.[190] For the purposes of this discussion it means that the security certificate and its supporting material ought to be vetted against the *Charter* and the rules of evidence. In doing so, judges do not encroach on policy or the role of the executive. It remains open for the executive to decide that there is a serious threat posed by terrorism and outline steps that should be taken to address that threat; this is properly within the realm of policy *development*. Courts are not to inquire into the wisdom of particular policy choices and so cannot tell the executive that it should not pursue terrorism as a policy priority. However, the rule of law demands that policy *implementation* must be consistent with legality.[191]

For example, when dealing with the terrorist threat using the security certificate process, judges have a constitutional duty to ensure that the implementation of this particular manifestation of anti-terrorism policy is not selective or discriminatory.[192] Experience with the security certificate process to date raises serious questions in this regard with respect to non-citizen Muslims in particular. It appears that the contemporary geopolitical *zeitgeist* of a "good versus evil" dialectic, where Islamic terrorism is the incarnation of evil, has crept into

[189] *UK Detentions*, *supra*, note 17 at para. 44.

[190] *Operational Dismantle* supports the principle that executive action must be consistent with *Charter* values.

[191] May even expand with realm of jurisdictional competency in times of emergency (*i.e.*, expand within policy and legislative role beyond federal scope) but, cannot occupy judicial jurisdiction/competency.

[192] This is especially important because the proceedings use secret evidence in *ex parte* hearings.

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the development and implementation of Canada's national security policy.[193] This is inconsistent with legality, and it is imperative for judges to make this known to the executive. Where they fail to do so they create conditions for the executive to operate outside the rule of law.

Again, the legality-policy dichotomy reflects Dworkin's policy-principle thesis, which asserts that policy is rightly focused on broader goals. However, where those policies may be expected to have adverse effects on individuals, they must be assessed to ensure that they are consistent with fundamental moral precepts that underlie the law and give it legitimacy.[194]

In concrete terms, this may require that mechanisms be put in place to ensure that *ex parte* proceedings operate within the rule of law. One such mechanism is the use of a special advocate or public defender to represent the interests of the detainee in closed proceedings. The advocate would have full access to all of the information before the designated judge and be able to cross-examine witnesses and test evidence. While this is not a perfect model, it does comply more closely with the rule of law and fundamental justice than the existing security certificate system in Canada. The UK's process designed to deal with non-citizens deemed to be national security threats is similar to Canada's, but differs by providing a security-cleared special advocate to represent the detainee in closed proceedings. Despite this, there remain significant flaws in the UK system as well. A number of these special

[193] See Privy Council Office, "Securing an Open Society: Canada's National Security Policy", (Ottawa: April 2004). Canada's first National Security Policy links threats to security with the abuse of openness, which is juxtaposed with immigration. It evokes emblems of the current war on terror and serves to perpetuate an "us vs. them" paradigm. While the Policy refers to civil liberties, diversity and the rule of law and the need to balance security against them there is little practical discussion of comprehensive oversight, compensation and preventative protections to ensure that national security does not erode fundamental rights.

[194] *UK Detentions*, *supra*, note 17 at para. 108.

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advocates have recently indicated significant misgivings with the process, especially in light of the *UK Detentions* decision. At least one of these lawyers, Ian Macdonald Q.C., has resigned in protest:

> I now feel that whatever difference I might make as a special advocate on the inside is outweighed by the operation of a law that is fundamentally flawed and contrary to our deepest notions of justice. My role has been altered to provide a false legitimacy to indefinite detention without knowledge of the accusations being made and without any kind of criminal charge or trial. Such a law is an odious blot on our legal landscape and for reasons of conscience I feel that I must resign.[195]

Clearly, the extraordinary tools designed to implement national security policy do not only make judges uncomfortable and leave them feeling like a "fig leaf" lending legitimacy to an unjust system. Advocates too are feeling the stresses of a system that has strayed far from its moral moorings.

In addition to improving the adjudicative process itself, significant improvement is required in the oversight and audit of national security policy and its implementation in Canada. This would look at intelligence gathering and sharing, identification and assessment of threats, deployment of resources, complaints, investigations and compensation. The root problem with Canada's national security policy and legislation is that too much of it is shrouded in secrecy. Openness, robust scrutiny and sunshine would do much to ensure that the Canadian state is pursuing legitimate national security objectives in a manner that is consistent with the rule of law and the moral principles that underpin our society.

[195] R. Verkaik, "More lawyers threaten to quit over Belmarsh" *The Independent [UK]* (20 December 2004) 8 and R. Verkaik, "Belmarsh: lawyers quit over secret hearings" *The Independent [UK]* (7 January 2005] 2. For a discussion of possible improvements to the process see Beare, *supra*, note 87 and Hugessen, *supra*, note 168.

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Finding New Enemies

Suresh settled the process of dealing with threats to national security posed by non-citizens. Although declaring that deportation to torture is contrary to section 7 of the *Charter*, the Supreme Court carved out an exemption that allows deportation to torture in exceptional circumstances. Those circumstances were left hanging, undefined, and arguably subject to executive discretion. In effect, the Court is saying that there may come a day when it is "legal" for the Canadian state to facilitate torture and execution if it is going to be done to a very bad person.[196] This is troubling because it dilutes a primary principle of constitutional and international law and basic morality.[197] In doing so it also serves to erode shared humanity because it offends human dignity, while in this case also treats some human beings with less respect than others based simply on national status.

The Court's approach in *Suresh* was influenced by the traumatic events of September 11, 2001, which reinforced the idea of "non-citizen as threat" and elevated that threat to an existential level. When faced with such threats policy apparently trumps legality. Popular discourse immediately after those events laid the blame on the outsider. Canadian Alliance Party leader Stockwell Day led the charge in Parliament, in one instance railing against the Supreme Court's *Singh* decision and demanding a lesser standard of fundamental rights for non-citizens:

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[196] Mahmoud Jaballah may become the first person deported to face torture because he is a threat to Canada's national security. The government has argued that releasing him could damage Canada's relations with Egypt, the country where he will be sent if deported. See H. Levy, "Must deport Jaballah , court told; Threat to security, says prosecutor Faces torture, his lawyer argues" *Toronto Star* (17 August 2004) A 16.

[197] Aiken, *supra*, note 101 at 31-41, for a discussion of bars to deportation including the risk of torture. I would add that deportation to torture not only offends Canada's international commitments, especially under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, especially Article 3, but is also contrary to the spirit of sections 7 and 12 of the *Charter's* guarantee of "security of the person" and prohibition of "cruel and unusual treatment or punishment" respectively.

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> the 1985 Singh decision of the supreme court has been a disaster for our refugee system. The Singh decision gives anyone who can put their toe onto Canadian soil the same *Charter* rights as a Canadian citizen.... Why does the Prime Minister not overturn this decision, which is a threat to our security...? [Refugees] impose themselves on us. Many do not have documents and are a criminal or security risk.[198]

As I have discussed in Chapter 2, the IRPA security certificate regime deals with national security threats posed by non-citizens through extraordinary measures. And, forbearance by courts assessing the government's response to those threats has practically created a vacuum of legality and betrayed the principle of shared humanity. Despite Day's criticisms, Canada is not a soft touch when it confronts non-citizens perceived to be threats to national security.[199]

As the search for enemies grew wider after September 11, the notion of the "citizen threat" began to emerge.[200] Some commentators began to suggest that potential terrorists might abuse our values and freedoms[201] thereby raising questions about identity, loyalty and citizenship.

Because the IRPA was not appropriate to address threats posed by citizens, the Chretien government introduced the ATA in October 2001, contending that traditional criminal law was not sufficient to prevent terrorist attacks.[202] The ATA was only one part of a larger legislative and policy agenda. While it attracted significant attention and debate, other

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[198] *House of Commons Debates* (30 October 2001) No. 105.

[199] Macklin, *supra*, note 101 at 394: "Contrary to the exhortations of media pundits and anti-immigrant crusaders, the Constitution has proved a fairly thin cloak protecting non-citizens."

[200] Lindh, Padilla and Hamdi are examples of this.

[201] E.Mendes, "Between Crime and War: Terrorism, Democracy and the Constitution", (2002) 14.1 National Journal of Constitutional Law 71.

[202] Department of Justice, Notes for the Minister of Justice, Appearance before the House of Commons Standing Committee on Justice and Human Rights Bill C-36, November 20, 2001.

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measures moved forward with less fuss.[203] In fact, the IRPA was introduced in early 2001 and passed into law in the fall of that year with relatively little public attention or debate.[204]

Occupying the space between the IRPA and traditional criminal law, the ATA can be described as "infill" or "hybrid" legislation because it covers the perceived gap between the IRPA and the *Criminal Code*[205] by grafting some of the IRPA structural elements onto traditional criminal law. In fact, some supporters of the government's agenda suggested that it fell in the space "between crime and war".[206]

In Chapter 3, I will attempt to illustrate how the ATA is based on the architecture[207] of the IRPA national security provisions, but is more restrained in tone and hence, more respectful of legality. These differences reveal important tensions in Canadian law and society.

First, the ATA highlights a tension regarding the extent to which the ethos of the *Charter* has – or should – become embedded in Canadian public policy and law making, at least where citizens are involved. Arguably, the *Charter* has tempered the executive's approach to national security such that it is more restrained than under the WMA approach, at least when dealing with citizens. During the WMA period, as I have discussed in Chapter 1, citizenship did not transcend ethnicity. The fact that many Canadian citizens were stripped of

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[203] For example, the Safe Third Country Agreement, with the United States and Bill C-11, which revamped the immigration legislation and introduced the IRPA.

[204] The existing immigration legislation already contained strong measures. The IRPA amendments simply made the legislation tougher, for example by truncating the appeal process.

[205] R.S.C. 1985 c. 46.

[206] Mendes, *supra*, note 201 at 72. This phrase is of concern because it resonates philosophically with the justification offered by the United States government for dealing with "enemy combatants" through extralegal measures.

[207] For example, *ex parte* proceedings, secret evidence and detention without charge.

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fundamental human rights because they were deemed to be of "enemy nationality" was evidence of this.

Second, the ATA reveals strengths and weaknesses in citizenship and identity, especially in a multicultural society.[208] While reinforcing stark distinctions between citizens and non-citizens, it is quite likely that the ATA's extraordinary criminal law powers will only be used against a particular subset of citizens, thereby distinguishing two classes of citizen as well. Therefore, the differences between the IRPA and the ATA are encouraging in one sense because they suggest that our conception of citizenship has matured by detaching itself to some degree from particular markers such as ethnicity.

The ATA then represents a tension or dilemma in itself. On the one hand it dilutes shared humanity by setting up structures that may treat some citizens as second class based on faith or ethnicity. While on the other hand, it treats citizens with more respect for the rule of law and fundamental rights when compared to non-citizens.

In the final analysis, however, the ATA serves to bring into sharp relief the reality that non-citizens fall outside the protection of fundamental human rights and the rule of law simply because of their status. By failing to hold the government to account for this significant departure from the rule of law, Canadian courts have facilitated the degradation of shared humanity as a fundamental principle that informs the law.

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[208] The ATA and the IRPA have challenged the integrity of a multicultural society because faith and opinion, rather than action, has become the marker for suspicion and investigation in the war on terror. See Dworkin, *supra*, note 1. However, the other side of this issue suggests that the strength of the multicultural society may have tempered the government's response to some extent, hence the differences between the IRPA and the ATA. See Macklin, *supra*, note 101 at 395. Because Islam is suspect, it is Muslim citizens who are subject to extraordinary measures.

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CHAPTER 3. The Enemy Within: Citizens and National Security

Following the terrible events of September 11, 2001, the United States launched a "war on terror" that to date has resulted in the invasion of Afghanistan and Iraq. On the domestic front of this new war, President George W. Bush enacted the *USA PATRIOT Act,*[209] which introduced extensive powers for police and other government authorities ostensibly to combat terrorism.[210] Many allies of the United States quickly followed suit, introducing similar legislation. The legislative agendas were set and promoted using the narrative of existential threats. And, the enemy was perceived to be everywhere.

Canada introduced the ATA in October 2001 as Bill C36; it became law shortly thereafter in December 2001. The pressures felt by the Canadian government to pass such significant legislation in short order were a constant subtext of much to the debate surrounding the legislation. Given Canada's proximity to the United States and our dependence on trade with the Americans, the unspoken threat of economic disruption was always a reminder why the ATA should quickly become law. The debate also began to test our national identity. It fueled the arguments of those who would integrate Canada into the United States. There was talk of common borders and integration of immigration and refugee policy, which in practical terms meant the adoption of US policy.[211] In the first months after the attacks it did appear

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[209] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*, Pub. L. No. 107-56.

[210] For an early critique of the USA PATRIOT Act see N. Chang & Center for Constitutional Rights, "The Silencing of Political Dissent: How the USA PATRIOT Act Undermines the Constitution", (New York: Open Media, 2001). See also Dworkin, *supra*, note 1 and Cole, *supra*, note 1.

[211] There was discussion of a common currency, common immigration policies and a unified perimeter around North America. For example, see A. Moens, "The Coming North American Security and Defence Agreement" (March 2003) Fraser Forum 16. See generally, B. McKenna, "Security zone will aid trade, Mulroney says" *The Globe and Mail* (10 December 2002) A8; J. Ibbitson and C. Clark, "Canada and U.S. tighten borders" *The Globe and Mail* (26 September 2001) A1; R. Mackie, "Eves, Pataki want Canada-U.S. security perimeter" *The Globe and Mail* (9 April 2003) accessed online at www.globeandmail.com. For public opinion on these issues

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that Canada had changed. However, with the passage of time and the debate over the war against Iraq, this change now seems to have been a temporary lapse.[212]

The domestic legislative agenda raised concerns about the violation of civil and human rights. An important subset of those domestic concerns in North America involved the victimization and alienation of Muslim communities. North American Muslims felt they were victims twice: first, because of the terrorist attacks as part of the larger community; and second, because hate-motivated crime, discrimination, and simple suspicion were directed at them. In the "us" versus "them" paradigm that has become the hallmark of the war on terror, some viewed all Muslims as the enemy regardless of their status.[213] This characterization of the enemy echoed the experience of Ukrainians and Japanese in Canada during the First and Second World Wars where citizenship did not override the assumption that one's ethnicity determined one's loyalty. Celebrated Palestinian-American intellectual Edward Said

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see Ipsos-Reid/Globe & Mail/CTV Poll, "Majority (85%) Support Making Changes to Create a Joint North American Security Perimeter" (Released 30 September 2001) accessed online at www.ipsos-na.com. and T. Harper, "Canadians feel closer to U.S. since attacks: Poll" The Toronto Star (29 September 2001) accessed online at www.ekos.com. For a detailed discussion of the impacts of September 11 on Canada and various competing forces in Canada's relationship with the United States, see K. Roach, *September 11: Consequences for Canada*, (Montreal: McGill-Queen's University Press, 2003) and R. Whitaker, "Keeping Up With the Neighbours? Canadian Responses to 9/11 in Historical and Comparative Context" (2003) 41 Osgoode Hall L.J. 241.

[212] M. Adams, *Fire and Ice: The United States, Canada and the Myth of Converging Values* (Toronto: Penguin, 2003). It is interesting to note that during the 2004 Federal election the governing Liberals contrasted themselves from the Conservative Party by distinguishing Canadian values as sharply different from U.S. value, especially with respect to the war in Iraq, health care and taxes.

[213] See International Civil Liberties Monitoring Group, "In the Shadow of the Law" (May 2003), which is a report on the use of the ATA and its adverse impacts on vulnerable communities. See also Coalition of Muslim Organizations, *Submission on Bill C-36 Anti-terrorism Act*, 8 November 2001, which discusses the particular concerns of many Canadian Muslims and contains an early attempt to compile hate motivated incident data. For justifications in support of using profiling against Muslims, see D. Pipes, "Why the Japanese Internment Still Matters" *New York Sun* (28 December 2004) and D. Pipes, "The price of war" *Jerusalem Post* (22 September 2004) 14, where he writes: "In the murky area of pre-empting terrorism, in short, it matters who one is. So, yes, profiling emphatically does take place. Which is how it should be. The 9/11 Commission noted that Islamist terrorism is the 'catastrophic threat' facing the United States and, with the very rarest of exceptions only Muslims engage in Islamist terrorism."

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captured the sense of fear and anxiety amongst Muslims and Arabs in the United States in the aftermath of the attacks:

> I don't know a single Arab or Muslim American who does not now feel that he or she belongs to the enemy camp, and that being in the United States at this moment provides us with an especially unpleasant experience of alienation and widespread, quite specifically targeted hostility. For despite the occasional official statements saying Islam and Muslims and Arabs are not enemies of the United States, everything else about the current situation argues the exact opposite.[214]

In the discussion that follows, I will address the debate over the ATA and attempt to demonstrate how the government's promotion of that legislation serves to embed an "us" versus "them" demarcation in Canada, which ultimately devalues the principle of shared humanity. The government's approach asks judges and citizens alike to "think outside the box", suggesting they should abandon traditional liberal democratic conceptions of rights, the state and the role of courts in order to thwart unique threats. This call for "new" thinking is problematic because it is justified by the presence of allegedly unique and unprecedented threats to society, which are the lifeblood of a culture of fear. History has demonstrated repeatedly that a culture of fear can easily be transformed into a pretext for assaulting human dignity in the name of protecting society.

In the latter part of this chapter, I will illustrate how particular provisions of the ATA take their cue from the IRPA regime, but are somewhat mediated by an appreciation of the *Charter* and respect for citizenship. Throughout the discussion in this chapter, I will overlay two strands that have remained consistent throughout Canada's history of dealing with threats to national security: (i) how national security legislation reinforces xenophobic strands in policy, thereby transforming vulnerable and identifiable communities into

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enemies; and (ii) the role of judges regarding their constitutional role to ensure that policy implementation comports with the principles of legality and ultimately, the rule of law.

Debate

The debate surrounding the introduction of the ATA was robust, attracting a diverse spectrum of civil society including labour groups, academics, religious groups, human rights organizations and legal associations. While the government argued that the ATA was necessary and reasonable, many of those opposed to the legislation saw it as a significant risk to democracy and the rule of law. Contrasted with this was the relative lack of debate surrounding the IRPA, which was introduced in the spring of 2001 and passed during the fall of that year. In many ways, this contrast exposed the reality of "who matters" in Canadian society; citizens are at least worth a public debate. The other reason for the lack of debate over the IRPA is the fact that non-citizens have been subject to extraordinary measures for many years; the IRPA security regime was not new compared to previous iterations of immigration law. As Audrey Macklin notes:

> Immigration law has long done to non-citizens what the *Anti-terrorism Act* proposes to do to citizens – without public outcry and with judicial blessing.[215]

The ATA debate turned on several salient points, including necessity and balance. Many critics argued that the ATA was not necessary because existing legislation contained adequate tools to deal with the threat of terrorism. The government, some suggested, was responding more to the interests of the United States than to the legitimate security interests of Canadians.

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[214] E. Said, "Thoughts About America", *Al-Ahram Weekly Online*, 28 February – 6 March 2002, Issue No. 575.

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In this chapter, I focus on the proposition that the ATA struck a new balance between rights and security and examine how that narrative morphed into the ostensibly holistic "human security" approach. I say "ostensibly" because the phrase "human security" was already deployed in the field of humanitarian development and human rights, most notably refugee protection. In that context, the phrase suggested an expansive view of rights grounded in a sense of human dignity that transcended the nation state paradigm. For our purposes it would be fair to say that the traditional notion of "human security" is in many aspects coincident with the principle of shared humanity. Thus, when pressed into service to promote the ATA, "human security" came with the aura of universalism but in reality simply served to justify extraordinary measures embedded in ordinary law. While I believe that "human security" was a disingenuous attempt to sugar-coat unpalatable measures, its use nonetheless reveals a distinction between citizens and non-citizens: the ATA at least purports to speak to human rights concerns while the IRPA is unadorned with even the rhetoric of rights.

Balance

The federal government originally marketed the ATA as a tradeoff, exchanging human rights for enhanced security. How would the courts assess this tradeoff? Justice Minister Anne McLellan expected the new legislation to survive Constitutional scrutiny, noting that the Supreme Court of Canada "would uphold [the ATA] against any future *Charter* challenge with the observation that the 'balance between individual rights and collective security shifted after the attacks.'"[216]

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[215] Macklin, *supra*, note 101 at 394.

[216] L. Weinrib, "Terrorism's Challenge to the Constitutional Order", in Security of Freedom, *supra*, note 8, 93 at 94. Following a visit to the destroyed World Trade Center, United States Supreme Court Justice Sandra Day

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While this expected juridical shift is of concern, the fact that the *Charter* was consciously acknowledged as a counterweight to the government's initiatives should not be entirely discounted. In fact, the government worked to ensure that the ATA was "*Charter*-proof".[217] Although some commentators, including myself, have criticized the practice of *Charter*-proofing as a minimalist sufficiency approach to rights protection,[218] *Charter*-proofing can, when contrasted with the introduction of the IRPA, be seen as the result of the *Charter*'s mediating influence on policy development and law-making. As I suggest in the latter part of this chapter, the *Charter* has limited how far the legality-policy balance can be tipped in favour of policy where citizens are involved. Non-citizens are another matter, of course. When the IRPA was introduced as Bill C11 in February 2001, the government unabashedly sold it as tough on refugees:

> The bill reintroduces key measures to strengthen the integrity of the refugee determination system. These include front-end security screening for all claimants, clearer grounds for detention, fewer appeals and opportunities for judicial review to delay the removal of serious criminals, and suspension of refugee claims for people charged with serious crimes until the courts have rendered a decision.[219]

There was no talk of balance or *Charter*-proofing even though rights were curtailed and due process was truncated. Clearly, non-citizens were not worth even perfunctory claims of respect for the *Charter*. In fact, there is no need for balance because it appears that the government has a one-dimensional view of non-citizens: as potential threats to public

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O'Connor remarked that "[w]e're likely to experience more restrictions on personal freedom than has ever been the case in this country." Cited in Chang, *supra*, note 210 at 13.

[217] In fact, following my appearance before a House of Commons Committee studying new anti-terrorism legislation one of the government's members on the Committee pointed to his briefing books and confidently remarked that "our lawyers tell us this thing is *Charter* proof."

[218] The "sufficiency approach" requires drafters to craft legislation such that it is barely sufficient to meet the minimum requirements of the *Charter*. See K. Roach, "The Dangers of a Charter-Proof and Crime-Based Response to Terrorism", in Security of Freedom, *supra*, note 8 at 131.

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safety.[220] This view appears to have infected judicial thinking on the issues as well, as illustrated in the Federal Court of Appeal's highly deferential *Charkaoui* decision. Chief Justice Richard makes special note that one of the objectives of the IRPA "is to protect the security of Canadian society."[221] The primacy of national security, coupled with a positivist stance to the rule of law, creates conditions where the principle of shared humanity has no place in the implementation of legislation or its adjudication.

Human Security

While the government originally presented the ATA as a tradeoff against rights in order to gain security, it eventually shifted gears and suggested that, rather than a tradeoff, the proposed legislation actually promoted human rights. Irwin Cotler, at that time a government backbench Member of Parliament, respected law professor and human rights advocate, was the government's salesman for the new pitch.[222] Cotler suggested that the critics had it all wrong; they were too fixated on traditional paradigms of law, rights and the citizen-state relationship.[223] Rather, he suggested, Canadians should "think outside the box".[224] Invoking the notion of exception[225] and fears of existential threats, he argued that:

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[219] Citizenship and Immigration Canada, News Release, "Immigration and Refugee Protection Act Introduced" (2001-03).

[220] Citizenship and Immigration Canada, Fact Sheet No. 6, Keeping Canada Safe: The Immigration and Refugee Protection Act" (2002).

[221] *Charkaoui*, *supra*, note 16 at para. 146.

[222] Cotler is currently the federal Minister of Justice.

[223] While Cotler argues that each citizen's right to life is primary and the state must exist to ensure it, that primary right and threats to it are inchoate. Conversely, the risks to particular rights posed by the ATA are clear and specific. And, there is the risk that threats to governments may be cast as human security threats and lead to abuses of power. Cotler places significant trust in the state as protector, almost implying that without the state we would have no rights. This new thinking ignores – or seeks to jettison – the notions of state-citizen relations that are the foundation of our constitutional democracy. In effect, Cotler's approach may cast the state as a rights holder requiring constitutional protection on the same level accorded to individuals. The rationale for rights protection in a constitutional democracy – especially one with an entrenched *Charter* or bill of rights – is that individuals, citizens and others, are protected against unjustified encroachments on their rights by the state. The "human security" paradigm seeks primarily to protect the state against existential threats. Of course,

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> the discourse and discussion of Bill C-36 ... has been somewhat beset, if not burdened, by a 'conventional wisdom' perspective in what is an unconventional, if not extraordinary time. In particular, analysis of the legislation has often proceeded from the juridical optic of the domestic criminal law/due process model, while a more inclusive model would be that of an international criminal justice system counteracting a transnational and existential threat. Similarly, the legislation has been characterized, if not sometimes mischaracterized, in terms of national security versus civil liberties – a zero sum analysis – when what is involved is 'human security' legislation that purports to protect both national security and civil liberties.[226]

"Human security" became a catch-all or umbrella right. As a result, all other considerations would be subsequent and subservient to this primary right. Arguably, in the event that "human security" conflicted with another right or value, under this approach human security would triumph.

As mentioned previously in this chapter, the use of the human security device in promoting the ATA reflects a greater concern for the interests of citizens over those of non-citizens, at a

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advocates of human security will argue that by protecting the state individual rights are also protected. However, Cotler's approach is problematic for two reasons: (i) existential rights, even if held by individuals, are claimed against the state, not against non-state actors; and (ii) the state does not hold a constitutional right to exist. Arguably, existential rights (and other rights) of individuals may be threatened by a variety of parties. It is plausible that the right to exist is put at risk by the industrial activities of energy companies, automobile manufacturers, cigarette companies, smokers or gun dealers. While a causal connection may be demonstrated between the impugned action and the risk to rights, it would be difficult to justify extraordinary and wide-ranging powers or "rights" for the state in order to address that risk. A more appropriate response might involve precise state regulation of those particular industries in order to protect the health of citizens. This specific and limited approach addresses the issue without marshalling the rhetoric and jurisprudential consequences of existential rights involving the state. A more concrete example would involve gangs and organized crime being cast as threats to our existence. Would such threats be sufficient to alter radically the criminal law and the right to association? Again, the threats posed to public safety can be adequately addressed without a wholesale restructuring of the legal order. Clearly, the existential right device may be marshalled into service to justify a wide variety of expanded state power; all, ostensibly, to protect human rights.

[224] Cotler, Terrorism, Security and Rights, *supra*, note 18 and in Security of Freedom, supra, note 8 at 111.

[225] It is interesting to note that in all arguments marshalled by the government, exception was a consistent theme. However, the response to that exception was through ordinary and permanent legislation. See Dyzenhaus, *supra*, note 161.

[226] Cotler, *supra*, note 18 in Security of Freedom at 111-112. However, international law also attempts to deal with extraordinary events through the derogation process, which is temporary and exceptional. As such, it is difficult to see how the ATA comports with an international law model.

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minimum in terms of rhetoric. However, in the paragraphs that follow, I will try to illustrate how Cotler's model also serves to create new distinctions between citizens themselves.

In Cotler's view, terrorism represents the ultimate threat to the existence of the state itself, which in turn threatens the liberty of all.[227] In this analysis the state plays a key role. Terrorism is raised to the level of crimes against humanity such as genocide and slavery.[228] While most can agree that terrorism is a crime with devastating consequences, and that special measures may be required to deal with it, it is troubling that the government chose to inject the human security/existential threat narrative into the debate. This approach is disingenuous not only because it may exaggerate the issue, but also because it comes dangerously close to delegitimizing critics of the government's strategy.[229]

In my estimation, "human security" is simply the traditional national security argument dressed in the language of rights. Lead architects of the ATA cast national security as the interest most fundamental to the legislation: national security is the "overarching justification to virtually all of the measures contained in the *Anti-terrorism Act*."[230] And, because it seeks to protect individual rights as a function of the state's existence, it is necessarily dependent on a narrow statist and status-based conception of rights.

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[227] Cotler, Terrorism, Security and Rights, *supra*, note 18 at 15, where he suggests that trans-national terrorism "is an assault upon, and a threat to, the most fundamental rights of the inhabitants of a democratic polity – the right to life, liberty and security of the person. Conversely, counter-terrorism legislation involves the protection of the most fundamental rights – the right to life, liberty, and security of the person".

[228] *Ibid.* at 18-19.

[229] W. Pue, "The War on Terror: Constitutional Governance in a State of Permanent Warfare?" (2003) 41 Osgoode Hall L.J. 267.

[230] S. Cohen, "Safeguards in and Justifications for Canada's New *Anti-terrorism Act*" (2002) 14.1 National Journal of Constitutional Law 100 at 103.

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It is especially ironic that the government chose "human security" to brand its anti-terrorism legislation because this term has traditionally been used in the refugee protection context. While the words are the same, the import of human security, when marshalled in support of national security measures, differs starkly from its use to protect refugees or other non-citizens at risk.

The traditional meaning of human security centers on a concern for the well-being of all people, regardless of status; it resonates in many ways with Dworkin's notion of shared humanity. Boundaries such as citizenship, nationality, ethnicity and sovereignty are muted to promote the rights of those who are the "victims of conflicts, as well as for a host of other problems that degraded the human condition."[231] This is an open-ended and expansive approach that seeks to create and promote rights for all rather than restrict them to some. Put simply, it centers on human beings as human beings in need, rather than as human beings who happen to be of a particular nationality, ethnicity or faith.[232]

In contrast, the government's use of human security created a restrictive, state-centered and status-based approach to rights. Cotler's approach serves several purposes, most notably to cast the ATA in a positive light because of its allusions to broader humanitarianism, and for the purposes of this discussion, to draw distinctions between "us" and the "enemy". Because it seeks to protect "us" from so-called existential threats, the narrative begs the question: who

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[231] Freitas, *supra*, note 103 at 34.

[232] See *ibid.* at 35-37, for discussion of human security in the humanitarian context.

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is "us"?[233] In so doing, it not only reinforces the image of the non-citizen as threat, but also suggests that some citizens may be threats to *our* existence.

Since not all citizens are perceived as threats it is likely that only a particular subset of citizens will face additional investigative scrutiny and be subjected to the new "outside the box" thinking. Experience has borne out the fears of many who argued that only Muslim citizens would fall under suspicion in the domestic front of the war on terror.[234] Therefore, in much the same way that the IRPA serves to cast non-citizens as threats, the human security narrative serves indirectly to cast some citizens as threats.[235]

Comparing IRPA and ATA

While the ATA shares significant structural traits with IRPA, it differs both in tone and the extent to which it offends the rule of law. These differences highlight the two approaches adopted by the government to deal with citizen and non-citizen threats. By comparing similar elements in the IRPA and the ATA, I will attempt to illustrate that the government's response to citizen threats is mediated somewhat by the existence of the *Charter* and respect for citizenship. As infill or hybrid legislation, the ATA stands between the IRPA and the

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[233] Since the state is central to Cotler's vision, national identity and status become crucial determinants for rights.

[234] For example, see Macklin, *supra*, note 101, S. Choudhry, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s.15 of the Charter", in Security of Freedom, *supra*, note 8, 367, and Coalition of Muslim Organizations, *supra*, note 213.

[235] This has been borne out in the spare use of the ATA (*i.e.*, it has not been used broadly), which speaks not only to the scarcity of the threat, but also to the fact that only particular communities are perceived as national security threats and hence subject to scrutiny. As well, it is interesting to note that the ATA's initial targets – in *Air India* and in the case of Ottawa software developer Mohammad Momin Khawaja (the only person thus far charged under the ATA) have been non-white Canadians. The RCMP arrested Khawaja on March 29, 2004 on charges of facilitating a terrorist activity and participating in a terrorist group. See RCMP, News Release, "RCMP lays charges under Sections 83.18 and 83.19 of the Criminal Code" (30 March 2004). Khawaja's case is subject to a publication ban and he continues to await the hearing of an appeal from his failed bail application: see J. Rupert, "Bail appeal for accused in bomb plot adjourned: Khawaja hearing put over to next year" *The Ottawa Citizen* (21 December 2004) C3.

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ordinary criminal law. As such, the IRPA-ATA-*Criminal Code* regimes establish a hierarchy or continuum of tools which the executive can use to respond to perceived national security threats. The hierarchy also distinguishes between citizens and non-citizens, and between citizens themselves, thereby creating three categories of foe: non-citizen enemy, citizen enemy, and citizen criminal. As a result, each of these classes is treated differently in terms of fundamental rights. My view is that these distinctions arise in large part from political determinations that are founded on a particular worldview rather than on policy determinations that are consistent with fundamental moral principles such as shared humanity.

I will compare the following elements of the IRPA and the ATA in order to illustrate these distinctions and their impact on shared humanity: (i) definition of terrorism; (ii) secret processes and evidence; (iii) prohibition on association/membership; and (iv) detention without charge.

Defining the Enemy

A cornerstone provision of the ATA is its definition of "terrorist activity". It is essential to many of the offences created in the legislation. From the outset, the government's attempt to define terrorism was imprecise, casting the net to capture much more than what one might intuitively describe as "terrorist activity" or "terrorism". The Canadian Bar Association, in its submission to the House of Commons Standing Committee on Justice and Human Rights, noted:

> Defining terrorism is not a simple task. While the September 11 attacks were incontrovertibly terrorist, other examples may not be so clear. Perhaps recognizing that acts constituting terrorism can depend on (among other

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> things) social context, historical perspective and racial, religious or other group identity, our courts have consistently refused to define the concept.[236]

The ATA's attempt to define "terrorism" is distinct from the IRPA regime, where the term was left open-ended. As I discussed in Chapter 2, many critics of the IRPA security regime complained that terrorism was so vague as to make it unconstitutional. In effect, terrorism was given unique content each time it was adjudicated, leaving those subject to the inadmissibility provisions simply guessing as to whether they qualified as "terrorists". The consequences to individuals of being found inadmissible were potentially devastating, and much of this hinged on vague terms influenced by political concerns.[237] In *Suresh*, the Supreme Court found "terrorism" not unconstitutionally vague but provided a more concrete definition. Terrorism for the purposes of the IRPA inadmissibility provisions is:

> any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[238]

Arguably, the ATA included a definition of terrorism[239] to address a possible challenge of unconstitutional vagueness. Notwithstanding the flaws in the ATA's definition, the fact that

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[236] Canadian Bar Association, *Submission on Bill C-36 Anti-terrorism Act*, (October 2001) at 17. See also, Coalition of Muslim Organizations, *supra*, note 213.

[237] Much of what informs the executive's inadmissibility determinations is coloured by a worldview that could best be described as statist and heavily influenced by our interdependence with the United States. Given *Suresh's* suggestion that deportation to torture may be justified in some cases, this raises the risk of significant adverse consequences resulting from sloppy enforcement and mistakes.

[238] *Suresh*, *supra*, note 20 at para. 98. This definition may continue to be politically charged because it does not require a nexus to Canada. Therefore, it will likely be influenced heavily by the interests of foreign states, leaving much room for the executive to leverage terrorism in the interests of trade or other matters entirely unrelated to genuine national security interests. See, for example, the influence of relations with Egypt in the deportation hearing of Mahmoud Jaballah, *supra*, note 196.

[239] *Criminal Code*, *supra*, note 205, s. 83.01(1).

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the legislation includes a definition at all highlights the difference between non-citizens and citizens.

Various concerns were raised about the definition of terrorism during the debate on the ATA. Many were concerned that the term was broad enough to criminalize valid, but unpopular, protest and dissent. The fact that the definition of terrorism attracted extensive debate during the introduction of the ATA is further evidence of the value of citizenship and illustrates who matters, both socially and juridically. The lack of a definition for terrorism in the IRPA did not give rise to any broad-based outcry.[240]

For the purposes of this discussion, one of the most disconcerting elements of the ATA's definition is the motivation clause, which requires the impugned activity to be undertaken for a "political, religious or ideological purpose, objective or cause" in order to qualify as terrorism.[241] This requirement to inquire into motive moves away from traditional criminal law, which requires only intent and act.[242] If motivation is a requisite for proving terrorist activity, enforcement authorities may be compelled to investigate the religious, political and ideological motives of suspects. Aside from making investigation and prosecution more complicated, it may also lead to the stigmatization of particular groups within Canada's diverse society.[243] Even if charges are never laid, the effect of security agencies and police

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[240] The lack of response does not discount the significant work and commitment of those advocating for non-citizen rights who did raise the issue passionately. The issue simply did not seize the media's or the public's attention.

[241] *Criminal Code*, *supra*, note 205 s. 83.01(1)(b)(i)(A).

[242] D. Stuart, "The Anti-terrorism Bill C-36: An Unnecessary Law and Order Quick Fix that Permanently Stains the Canadian Criminal Justice System" (2002) 14.1 National Journal of Constitutional Law 153. Writing about the motivation clause, Stuart notes, "criminal law has sought to avoid proof of a bad motive as a requirement for criminal responsibility. It is too hard to prove and may, as here, lead to curious results. Why should a violent terrorist with unfathomable motives not be included...The unfortunate reality of retaining the motive clause is that there will be religious and political targeting" (at 155).

[243] Muslims may be targeted as Ukrainians and Japanese were for political expedience.

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targeting particular communities, simply because they are "suspicious" or hold unpopular religious or political views, will be profound.

While the ATA is neutral on its face, many Muslim Canadians continue to see themselves as targets. And, the motivation clause could serve as a tool to hone in on those targets.[244] In the wake of September 11, national security commentators highlighted our vulnerabilities and focussed on the threats posed by particular communities within Canadian society, some explicitly and others in a more muted tone, all with the result that we must be on guard with respect to particular communities within our society. And, if these citizen enemies were "abusing freedom", one could not be faulted for suggesting that their freedom should be limited to protect us.[245]

I believe the motivation clause reinforces this proposition because it is important to ask: which citizens was the government most concerned about when drafting the ATA? There

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[244] See Choudhry, *supra*, note 234, S. Choudhry and K. Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability" (2003) 41 Osgoode Hall L.J. 1, and R. Bahdi, "No Exit: Racial Profiling and Canada's War Against Terrorism" (2003) 41 Osgoode Hall L.J. 293. Discretion, coupled with the motivation clause, opens the door to discriminatory operational practice regarding who is investigated. Thousands of CSIS and RCMP interviews over the last three years have been very selective and applied in a "shotgun" approach to the Muslim community in Canada.

[245] In the days following September 11, 2001, former Canadian General Lewis MacKenzie, in his role as Ontario's chief security advisor, argued that the government would be justified in focusing it efforts on particular groups of people. On a CBC Radio program, he remarked that "ethnic profiling ... goes against our sort of gut instincts, but quite frankly if you're going to be forced to deal with these problems, and it's proven to be ... once again from one particular segment of the international society, then I'm sorry more current attention is going to have to be paid to people who are obviously, potentially part of that group." See R. Brennan, "MacKenzie vows to speak out on security issues; Will ignore critics' opinions" *The Toronto Star* (5 October 2001) A7. Other former security officials also suggested that the federal government should subject potential public service employees whose roots are in the "Third World" to more rigorous security checks. Former CSIS director Reid Morden remarked that "[i]f we're going to have diversity in the public service to reflect our population, it is going to continue being a problem." See C. Cobb, "PS told to tighten Third World hiring: Better screening needed, say former security chiefs" *The Ottawa Citizen* (20 September 2001) C5. The comments were made in the immediate aftermath of the horrible events in the United States and understandably many people were reacting initially through shock, fear and anger. However, these types of arguments and rationalizations, especially when made by senior national security and intelligence officials, speak volumes about the possible mindset in the national security bureaucracy, which may serve to erode fundamental rights built upon the foundation of shared humanity by evoking the WMA-era notion that ethnicity is coincident with full citizenship.

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were valid concerns about the erosion of fundamental values under the ATA, and it likely would not have received the significant public support that it did had it been perceived as applying to all Canadians.[246] However, the rationale offered in support of the ATA by some in public life and some in the public square amounted to something like this: "you don't have anything to worry about if you haven't done anything wrong." Arguably, there was a general appreciation that these extraordinary powers would only be used against some citizens and the motivation clause, I believe, serves to reinforce that perception.[247] Dworkin, writing about the Bush administration's national security policies suggests that:

> no American who is not a Muslim and has no Muslim connections actually runs any risk of being labeled an enemy combatant and locked up in a military jail. The only balance in question is the balance between the majority's security and *other* people's rights....[248]

The inclusion in the ATA of a definition of terrorism thus illustrates the government's approach to citizen interests on two levels. First, efforts to *Charter*-proof the ATA from a charge of vagueness suggest an increased respect for citizens. Second, the inclusion of a definition reassures the broader citizenry that these new powers would be only be used against some citizens.

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[246] See Roach, *supra*, note 211 at 75-76. Polling data indicate that there was significant public support for the new measures.

[247] Why would the government focus on particular subsets of violent activity to define terrorism? I would suggest that the motivation clause is a clear example of contemporary policy biases creeping into legislation. Judging from publicly available intelligence material, popular discourse and the views of many political pundits, religious motivated violence, especially "Islamist-terror", is the primary existential threat to the West. As such, the ATA's motivation clause simply turns biased policy into a legal standard. Therefore, when judges are faced with determining whether the person before them is a terrorist, they must include in their analysis an assessment of the accused's faith, devotion and practice.

[248] Dworkin, *supra*, note 1.

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Secrecy

Both the IRPA and the ATA make use of *ex parte* proceedings that use secret evidence. While the use of these types of proceedings in both statutes offends the principles of open justice and fair hearings, the ATA is relatively restrained.

The ATA establishes an administrative process whereby a list of terrorists is created.[249] This list may be used in three ways. First, those on the list are subject to scrutiny by the state and private parties. Second, the list serves as foundation evidence for a variety of serious offences under the ATA, such as the facilitation of terrorist activity or participation in terrorist activity.[250] Third, the list is significant to a regime of private enforcement, which may result in social ostracism.[251] The fact of being "listed" is sufficient evidence that an individual or organization is a terrorist entity, which conclusion then becomes the basis for prosecution of that entity or anyone associated with it.

The Minister's decision to list an entity may be judicially reviewed.[252] Since the Solicitor General's determination will likely be based on information provided by national security

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[249] *Criminal Code, supra*, note 205, s. 83.05. The Solicitor General creates this list. See A. Dosman, "For the Record: Designating 'Listed Entities' for the Purposes of Terrorist Financing Offences at Canadian Law" (2004) 62 University of Toronto Faculty of Law Review 1, which examines various types of domestic and international terrorist lists. These are essentially regulatory processes with little or not oversight. The number of lists, the parties involved and the complexities of process make it extremely difficult to correct mistaken identifications of individuals and groups as terrorist. The example of Ottawa's Liban Hussein is a compelling example of an innocent person being caught in the web of anti-terrorism measures after September 11, 2001. In addition, the lists reveal an almost exclusively focus on Islamic organizations and Muslims, demonstrating once again the risk of profiling (at 23).

[250] Participation is criminalized by s. 83.18 and carries a maximum sentence of 10 years imprisonment. Facilitation is criminalized by s. 83.19 and carries a maximum sentence of 14 years imprisonment. Keep in mind that s. 83.26 provides for sentences to be served consecutively, rather than concurrently as is the case in ordinary criminal offences, where charges arise out of the same event. For example, being charged with participation and facilitation, Khawaja faces a maximum term of imprisonment of 24 years. See *Criminal Code, ibid.*

[251] Through discrimination in employment, accommodation and education and other interactions and transactions in the private sphere.

[252] *Criminal Code, supra,* note 205, s. 83.05(5).

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agencies, the ATA allows for portions of the judicial review to be conducted *ex parte*. Following the *ex parte* review, a summary of the information may be provided to the listed party as along as it would not compromise national security.[253]

As discussed in Chapter 3, the IRPA security certificate hearing also provides for summaries of information to be provided to the detainee. However, both *ex parte* disclosure schemes contain an executive veto procedure – described as a "Kafkaesque charade" – whereby the Solicitor General may remove information placed before the judge for consideration, if the judge determines that a summary of that information should be provided to the detainee or listed party.[254]

Despite the fact that the summary disclosure veto mechanisms are identical, the ATA's veto is limited to information obtained from foreign governments or international organizations, while the IRPA veto applies to all information deemed sensitive. It is arguable that in practice the distinction is illusory since the bulk of intelligence and national security information is likely to contain some foreign element, thereby triggering the executive veto. However, the apparent restraint in the ATA suggests an attempt to protect it from a *Charter* challenge. A blanket veto applied to citizens in the style of IRPA would likely not survive constitutional scrutiny. Thus, the ATA carves out a niche that serves to retain the trust of allies while technically not running afoul of the *Charter*. As such, it appears that the ATA was tempered by an appreciation of the *Charter* and legality as compared to the IRPA. Once

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[253] *Ibid.* ss. 83.05(6)(a) and (b). However, the usefulness of these summaries is questionable because it is likely that the information not disclosed weighs heavily in the judicial determination.

[254] *Ibid.* s. 83.06. IRPA, *supra*, note 10, s. 78 (f). See K. Roach, "The Challenge of Anti-terrorism to Independent Courts" [2002] 47 McGill Law Journal 922 at 930. Aside from offending fairness, the veto creates an uncomfortable position for judges who are exposed to information they deem relevant but which they are unable to consciously use. There is a risk that the excluded information will still inform their decision while the

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again, in the calculus of national security the rights of citizens appear to be worth more than those of non-citizens.

Membership

While the IRPA inadmissibility provisions clearly prohibit membership and association, the ATA does not go as far. Arguably, a prohibition on membership would run afoul of the *Charter's* protection of association and, in an effort to *Charter*-proof the legislation, an explicit prohibition on membership was avoided.

Non-citizens are denied a free associational life, which is an important element of deliberative democracy and integration into social, political and economic life. On the other hand, citizens are entitled to a broader scope of participation.

As discussed in Chapter 2, the IRPA prohibits membership in "terrorist" organizations, and the criteria for membership are quite loose. Immigration officials may consider a range of lawful activity as indicators of membership and hence terrorist culpability. Therefore, non-citizens who innocently participate in the otherwise lawful social, cultural, political and religious activities of an organization may find themselves named as security threats and hence subject to indefinite detention and deportation. The IRPA approach to membership echoes the blanket criminalization of FLQ membership during the October Crisis.

In contrast, the ATA avoids criminalizing membership and focuses on act and intent in order to render a citizen guilty of being a terrorist. Knowledge is a requisite element for the central

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detainee is not even aware that it exists. In this instance, the executive takes on the essential and exclusive judicial role of determining the relevance and use of evidence.

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terrorism offences.[255] Because it is a criminal process, the ATA's terrorism crimes will largely be dealt with in open processes[256] and the standard of proof will be the criminal standard. In the only charges that have been laid thus far under the ATA, Ottawa software developer Mohammad Momin Khawaja has been charged with participating in the activities of a terrorist group and facilitating a terrorist act. Unlike the security certificate detainees, Khawaja has not been held without charge. Furthermore, he is entitled to the protections afforded by the criminal process, which means that the Crown must prove his guilt beyond a reasonable doubt based on evidence tested against known standards. While significantly more respectful of the rule of law, these offences nonetheless raise some concern with respect to creating a constructive prohibition on membership when read with other provisions in the ATA.[257]

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[255] *Criminal Code, supra*, note 205, ss. 83.18, 83.19, 83.2, 83.21, 83.22, and 83.23. Participating, facilitating, instructing, and harbouring hinge on involvement with a "terrorist organization".

[256] Open in the sense that the accused is entitled to participate with counsel in the proceedings. However, national security sensitivities may be used to justify publication bans as in the Khawaja case. See *The Ottawa Citizen, supra*, note 235.

[257] Arguably, there is a constructive ban on membership because the definition of a terrorist organization relies heavily on the Solicitor General's terrorist list, which is compiled on the basis of secret evidence with low standards of evidence and proof. This definition plays a central role in finding culpability for key terrorism offences, such as those Khawaja is facing. In my view, the "participation" provisions of the ATA, when read together with the listing provisions, create a chill on the associational life of some citizens, which ultimately amounts to a constructive prohibition on membership. In determining whether an accused is guilty of participation with a "terrorist group", the ATA directs judges to take into account whether the accused "uses a name, word, symbol or other representation" connected to the group, or "frequently associates with any persons who constitute" the group. And, because motivation is a central element of the definition of terrorism, and as discussed above, the reality of the policy agenda is a focus on Islamist terrorism, that focus will inevitably be on Muslims and their organizations. Therefore, a combination of low standards of proof, secret evidence and discriminatory practice may result in the constructive criminalization of association for some citizens. See *Criminal Code, supra*, note 205, s. 83.18(4). See also D. Paciocco, "Constitutional Casualties of September 11: Limiting the Legacy of the Anti-terrorism Act" (2002), 16 S.C.L.R. (2d) 185 at 187 for a discussion of association based offences.

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Detention Without Charge

The ATA introduces detention without charge into Canada's criminal law. Acting on information laid by a peace officer, a provincial court judge may order the arrest of a person if there are "reasonable grounds" to believe that an act of terrorism will be prevented.

As discussed in Chapter 2, the IRPA allows for detention without charge under the security certificate process. Once a certificate is filed, foreign nationals are automatically detained and permanent residents are detained pursuant to a warrant issued by the executive.

Both the ATA and the IRPA detention schemes have been defended by the government as "preventative" rather than "punitive". As a result, the argument goes, they ought to attract a less rigorous level of scrutiny and justification. However, from the point of view of the detainee, such distinctions matter little when the fact and real consequences of detention are not altered by the rationale supporting it.[258]

The most significant differences between the IRPA and the ATA are with respect to the bounds of detention and judicial oversight and authorization. Detainees held under security certificates are held virtually indefinitely. Although there are detention reviews, experience with security certificates demonstrates that once a certificate is found to be reasonable it is practically impossible to overcome.[259] The long periods of detention endured by the current detainees are evidence of this.

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[258] Cohen, *supra*, note 230. Compare this to the House of Lords rejection in *UK Detentions* of the "three walls" argument as not realistic because the focus ought to be on the consequences for the individual's liberty.

[259] Virtually all of the security certificates reviewed by the Federal Court have been found to be reasonable. This jurisprudence, which was reaffirmed in *Charkaoui*, has emboldened the government in its position that the security certificate process is fair and justified.

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On review, the standard for continued detention is national security risk, which is the basis of the security certificate in the first place. Given the use of *ex parte* proceedings and secret evidence, it is virtually impossible to overcome the overwhelming presumption created in favour of continued detention. Apart from the reasonableness review, there is no substantive judicial authorization for the detention. In fact, it is a Minister, not a judge, who has the discretion to order a non-citizen detained as a security risk. This distinction between citizens and non-citizens crystallized during the Project Thread operation undertaken by the RCMP in 2003; the government reached for the IRPA[260] because of the broad powers it grants for dealing with national security threats as compared to the ATA.

Project Thread was a joint operation by the RCMP and immigration officials in August 2003 that resulted in the detention of 21 South Asian men on suspicion of links to Islamic terrorism. Ostensibly in the course of investigating a bogus business college, the investigators "began to see an alarming trend with respect to the [men]."[261] Some of the evidence that causes the investigators such alarm included the following:

- the group was populated by males aged between 18 and 33;
- they came from a particular part of South Asia "that is noted for Sunni extremism";

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[260] The government did not use security certificates but rather opted for other broad detention powers under the immigration legislation, which allows for detention based merely on the fact that the government would like to conduct an investigation. As such, this detention power is founded on negligible justification and creates a presumption in favour of detention. See IRPA, *supra*, note 10, s. 58(1)(c). Arguably, this detention power may be deployed even faster than the security certificate because the "reasonableness" review suggests that there is at least some evidence or information to support detention.

[261] RCMP, "Project Thread Backgrounder: Reasons for Detention pursuant to 58(1)(c)" (19 August 2003). The detentions captured headlines and stoked fears of terrorist sleeper cells amongst us, while entrenching the perception of migrants posing existential threats to Canada. For example, see S. Bell, "Suspected al-Qaida sleeper cell members will remain in custody" *CanWest News Service* (27 August 2003), S. Bell, "Another arrest made in possible Toronto al-Qaida sleeper cell case" *CanWest News Service* (29 August 2003), Canadian Press,

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- they engaged in their business college studies in "a dilatory manner";
- anonymous "tips" noting the men's "strange behaviour" were called in to the RCMP following September 11, 2001;
- one of the men was taking flying lessons during which he flew over or near a nuclear power plant; and
- the men knew two people who took an early morning walk on the beach near the same power plant.[262]

Certainly, some of the other evidence in the case suggested that the men might have been involved in fraudulent immigration activity, but none of it suggested involvement in terrorism. However, given the loose standards of evidence under the IRPA, coupled with the biases and stereotypes of security agencies, the men were held in detention for several months and became the focus of international media scrutiny and heightened public fears that terrorist cells had infiltrated Canada. Those promoting security agendas callously exploited the detainees. One notable example was the exploitation of fear in televised election advertisements by Ontario's Progressive Conservative Party, even after all terrorism allegations had been dropped.

The men were eventually cleared of the terrorism allegations. However, many were deported on the basis of other immigration charges and they continue to suffer the stigma of terrorism in their native lands. If anything, Project Thread proves the need for courts to be more

"19 people held while feds investigate possible links to terrorism: report" *Canadian Press Newswire* (22 August 2003).

[262] *Ibid.*

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vigilant, rather than more deferential, when it comes to assessing the executive's national security claims and its calls to "trust us".[263]

Compared to the IRPA, the ATA is more restrained because indefinite detention for citizens would likely not survive constitutional or political scrutiny. Thus, the ATA goes only so far as to permit detention without charge for a maximum of three days and provides for prior judicial authorization and open processes.[264] Even though there is an appreciation that these measures will be used against a small number of citizens, there remains a reluctance to introduce more extreme measures – such as indefinite detention under the IRPA – into the criminal law. This reluctance reveals not only a flawed logic but also fails to produce real safety. Indeed, the House of Lords eloquently drew out a similar distinction between citizens and non-citizens in the United Kingdom by exposing the flawed rationale underlying the differential treatment of citizens and non-citizens with respect to indefinite detention without charge in that country:

> In principle, the nationality of the suspects would be irrelevant to the threat that they posed. If a man is holding a gun at your head, it makes no difference whether he has a British or a foreign passport in his pocket. Similarly, if a network of terrorists is planning an attack on the life of the

[263] While a narrator proclaimed that Progressive Conservative Party leader Ernie Eves could manage tough crises, images of newspaper headlines were laid across the screen evoking the SARS crisis, the power blackout of 2003 and terrorist threats uncovered through Project Thread. It is interesting to note that the advertisements continued to be aired even after it was clear that the terrorism allegations against the 21 South Asian men were unfounded. See Canadian Press, "Terrorist suspects out on bail, immigration says they aren't security threat" *Canadian Press Newswire* (26 September 2003), where an immigration official continued to justify the detentions remarking that the government "had reasonable suspicion, [and] whenever you have reasonable suspicion it is our duty to investigate." See also, Canadian Press, "Cleared of terrorist charges, student deported to Pakistan from Toronto" *Canadian Press Newswire* (4 November 2003), where 21 year old Muhammad Waheed expressed the fear and anxiety resulting from the detention and subsequent deportation order: "I am feeling so much fear for my return to Pakistan. Even though I wasn't convicted, I have a reputation of being a terrorist."

[264] *Criminal Code*, *supra*, note 205, ss. 83.3(6) and (7), and 83.3(2) and (3). However, there is the risk of revolving door detention where suspects may be detained on several separate instances.

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> nation, the danger is the same, irrespective of the nationality of the individuals involved.[265]

Notwithstanding the ATA's relative restraint, these provisions continue to be cause for concern. Given the government's rhetoric in marketing the ATA as a preventative tool, which claimed that nihilistic terrorists could not be thwarted once they were aboard aircraft, one wonders how a three-day detention with conditional release on bail will dissuade a committed suicide bomber from his mission? It is more likely that this tool will be used to intimidate, disrupt activity or extract information. The combination of "religious" motivation and questionable intelligence information creates the prospect that blunt profiling will lead to serious mistakes. Those who will be preventatively detained will wear the stigma of terrorism for many years to come. Ironically, the ATA's detention scheme may lead to absurd and ineffective results where the stubborn innocent person who refuses to accede to bail conditions may face one year in jail, while the genuine terrorist will willingly agree to conditions but not comply.

[265] *UK Detentions*, *supra*, note 17 at para. 161. The derogation must be strictly necessary, and the fact that citizen suspected of being terrorists can be controlled without indefinite detention is evidence that the measure is not strictly necessary.

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CHAPTER 4. Difficult Choices: National Security and Courts after September 11

I suggested in Chapters 2 and 3 that while the ATA and the IRPA represent departures from the rule of law, there remain significant differences in the extent of those departures. As infill legislation, the ATA is essentially a hybrid of criminal law and the IRPA security provisions. It employs extreme methods that are unfamiliar to traditional criminal law and pushes the envelope on the rule of law, while maintaining some fidelity to legality or principle by preserving elements of criminal procedure and *Charter* rights. In that way, the ATA is more law-like than the IRPA and the WMA.

This IRPA-ATA axis is a manifestation of David Paciocco's concern about the potential of the ATA's extraordinary measures eventually "creeping" into other areas of law.[266] While I agree with Paciocco regarding that risk, I would suggest that elements of the IRPA security regime have already crept into traditional criminal law *via* the ATA.

In Chapter 2, I discussed the role of judges under the security certificate process and suggested that the executive has occupied the judicial space either directly, by taking on essential judicial functions, or constructively, by expecting high deference to its claims where national security issues are involved. Where judges fail to discharge their obligations not only do they create a vacuum of legality and degrade shared humanity, but in doing so they also act unconstitutionally. Under the aura of national security policy needs, both the Supreme Court of Canada and the Federal Court of Appeal have approved legislation that deals with non-citizens in a manner that profoundly offends fundamental moral principles that order our society and law.

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[266] Paciocco, *supra*, note 257 at 191.

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In this chapter, I address the judicial record with respect to the ATA and conclude that while similar risks exist they are tempered to some extent by a respect for citizenship and *Charter* rights. To date there has only been one judicial assessment of the ATA. In *Air India,*[267] the Supreme Court of Canada reviewed the use of the investigative hearing provision of the ATA in relation to the trial of Ajaib Singh Bagri and Ripudaman Singh Malik, who are alleged to be responsible for bombings of two Air India flights in 1985. That decision is a mixed message about the ATA, an observation that reinforces the notion that the ATA is hybrid legislation. While finding the provision to be valid, the Court did reign in the government's attempt to justify the ATA's powers in terms of broader concerns for national security. In my view, this approach is more respectful of rights than its approach the Court's approach in *Suresh*, where it endorsed high levels of deference and opened the door for Canada's involvement in the facilitation of torture. *Air India* also stands in contrast to the Federal Court of Appeal's decision in *Charkaoui*, which is resoundingly deferential and grounded in a "rule-book" understanding of the rule of law. Once again, this illustrates the divergent approaches to the rights of citizens and non-citizens in Canada. Nonetheless, the ATA does erode the traditional role of courts in this country.

Blurring the Judicial Role

Investigative hearings[268] provide for compelled testimony where the government seeks to disrupt potential terrorist activity.[269] Aside from issues relating to self-incrimination,[270] it

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[267] *Supra*, note 21.

[268] There is no similar IRPA provision, but arguably security certificates achieve the same purpose but only more bluntly.

[269] Paciocco, *supra*, note 257 at 219. Distinguish this with other compelled testimony, for example, administrative processes where the rights at stake and potential consequences are not the same as in the criminal process. But see Cohen, *supra*, note 230 at 115.

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also raises concerns about judicial independence.[271] Unlike the ATA's listing provision or the IRPA's security certificate procedure, where the executive is usurping the judicial function, compelled testimony pushes judges into an unfamiliar role where they become participants in the investigative process. Paciocco describes the dangers of making judges into investigators:

> Judges are co-opted into the criminal investigative process. They are brought into the process for no other purpose than to husband the inquisition. They are not adjudicating anything. There are no factual controversies to resolve, or no legal question to be tried, other than those that arise incidentally to the interrogation. This is not even like a search warrant application where a judge is called on to pass judgment about whether the grounds exist for providing legal authorization to invade privacy. While judges are not cast into the role of inquisitors...they are nonetheless expected to become part of the state's investigation. This, in my opinion, is a startling and a serious contravention of those basic constitutional norms that define the role of judges in our accusatorial, adversarial system.[272]

The rule of law, the constitution and the adversarial system require judges to be independent and impartial. Impartiality denotes a state of mind applied to the issues at hand. And, independence speaks to the institutional relationship between courts, the executive and the legislature.

In *Air India*, the Supreme Court held investigative hearings to be constitutional, with the majority holding that sufficient safeguards exist to protect both the rights of those compelled to testify and judicial independence.[273] However, in a strong dissent, Justices LeBel and Fish suggested that investigative hearings erode the institutional independence of the judiciary

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[270] This effectively *Charter*-proofed the provision from the most obvious line of attack. But the residual impact of harassment and stigmatization is not sufficient to find it contrary to *Charter*.

[271] See the dissent of Justices LeBel and Fish in *Air India*, *supra*, note 21, at paras. 169-191.

[272] Paciocco, *supra* note 257 at 232.

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even where actual independence is not compromised.[274] I agree with the dissenting judges that, at a minimum, investigative hearings erode the perception of independence, thereby placing public confidence in the separation of powers at risk. While non-lawyers may not articulate the importance of courts by referring to the "separation of powers" or other terms of art, their appreciation of the role of courts in a constitutional democracy does boil down to fairness and a sense that judges are neutral arbiters between themselves and the state. Viewed from the eyes of the compelled party, the judge is not an arbiter and safeguard of rights, but an inquisitor clothed with the legitimacy, authority and power of judicial office.[275]

Notwithstanding these serious flaws, both the government and the Court demonstrated some respect for legality in terms of substantive rights and process when compared with the IRPA security certificate process and its tools of investigation.[276] In fact, it is interesting to note that in addition to being tempered in *Air India*, the Court was divided on the issues, with Justices LeBel and Fish offering a strong call for the preservation of judicial independence and impartiality. This contrasts with *Suresh* and *Charkaoui*, which were both unanimous decisions of the Supreme Court and Federal Court of Appeal, even though it is arguable that with indefinite detention and removal to torture involved, more significant interests were at stake in those cases than in *Air India*. While Canadian courts find ways to rationalize unjustifiable distinctions between citizens and non-citizens, the House of Lords has spoken

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[273] *Air India*, *supra*, note 21at paras. 80-92. See also Paciocco, *ibid.* at 231-236, on the importance of judicial impartiality and independence.

[274] *Air India*, *ibid.* at para 169. Also, institutional independence "ensures the separation of powers", which is central to the rule of law (at para. 172).

[275] *Ibid.* at para. 187, where the dissenting judges conclude that the investigative hearing process makes it "reasonable for the public to perceive the judicial and executive branches are allies."

[276] The proceedings are not *ex parte* and there is protection against self-incrimination. The Court extended this protection to non-citizens. Realistically however, if the government wants information from a non-citizen – especially refugees at risk – "soft use" of their authority through intimidation and informal interrogation is

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clearly and robustly in opposition to such distinctions where fundamental rights and liberty itself are at stake.[277]

Choosing to Defer

While investigative hearings directly interfere with the role of the judiciary, there exists another danger to the rule of law and the separation of powers when judges choose to offer heightened deference to the executive. While they are not barred from being judges,[278] they choose to forbear because of the needs of national security. The government is betting that courts will alter the accepted balance between individual rights and state interests because of "existential threats". Bundling the ATA with the reconceived notion of "human security" and "outside the box" thinking indicates an expectation that, when adjudicating the violation of rights, national security will be offered greater leeway.

The urgency and secrecy that adorn national security issues work well to create an air of deference in judges, which is illustrated in the Federal Court's security certificate jurisprudence:[279]

> The judicial approach typically reflects an unwillingness to scrutinize the interests of national security against the competing values intrinsic to the rule of law and constitutional democracy. It also belies a clear contradiction. The denial of institutional competence suggests that the appropriate response would require that courts decline to entertain these cases at all, identifying them as non-justiciable.[280]

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probably the tool of choice. Of course, if this approach is not successful they still may opt for the security certificate as a way to extract information without the full requirements of legality.

[277] *UK Detentions*, *supra*, note 17.

[278] Test merits of executive claims, inquire rigorously, and test evidence according to legality.

[279] See *Suresh*, *Charkaoui*, *Ahani*, and *Chiarelli*.

[280] Aiken, *supra*, note 106 at 117. See also Whitaker, *supra*, note 101, on the role played by national security in refugee policy.

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The Supreme Court cemented this approach in *Suresh* and the Federal Court of Appeal reaffirmed it recently in *Charkaoui* where non-citizens are concerned. In *Air India*, the Supreme Court expressed the need to balance security and rights, acknowledging a key role for the other branches to respond to terrorism:

> Although the constitutionality of a legislative approach to terrorism will ultimately be determined by the judiciary in its role as the arbiter of constitutional disputes for the country, we must not forget that the legislative and executive branches also desire, as democratic agents of the highest rank, to seek solutions and approaches that conform to fundamental rights and freedoms.[281]

However, while deferential, this approach was less restrained in setting bounds on the executive in national security matters when compared with *Suresh* and the Federal Court's security certificate jurisprudence. Responding to arguments that the ATA be viewed as broader national security legislation,[282] the Court warned that:

> [such a] characterization has the potential to go too far and would have implications that far outstrip legislative intent...courts must not fall prey to the rhetorical urgency of a perceived emergency or an altered security paradigm...Notably, the Canadian government opted to enact specific criminal law and procedure legislation and did not make use of exceptional powers, for example under the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), or invoke the notwithstanding clause at s. 33 of the *Charter*.[283]

While I disagree with the majority's ultimate findings, this attempt to taper and reign in the use of an amorphous national security justification indicates that even after the events of September 11, 2001, judges may not have fully embraced the call to "think outside the box".

Clearly, Canadian courts have settled on a disjointed approach to national security legislation that not only pushes the envelope on fundamental rights, but does so based largely on status.

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[281] *Air India*, *supra*, note 21 at para. 8.

[282] Which suggests that increased deference to the executive may be appropriate.

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While both IRPA and the ATA offend the rule of law, the IRPA effectively creates a rule of law vacuum for non-citizens because it ignores basic moral principles such as shared humanity and human dignity. Courts play a role in creating this vacuum where they do not measure national security legislation and its effects against these standards of morality. *Suresh* and more recently *Charkaoui* are testaments to this. Ironically, only days after the release of *Charkaoui*, the House of Lords issued the *UK Detentions* decision. In an eloquent and compelling judgment, the Law Lords overwhelmingly found that indefinite detention without charge when applied to non-citizens only is unjustifiably discriminatory and disproportionate. While acknowledging the serious threat posed by terrorism and the need for the government to take steps to address it, the Lords nevertheless found that such extreme measures were not strictly required because they applied only to suspected terrorists who happened to be non-citizens. As such, they failed the proportionality test and violated the principle of equal treatment:

> If the situation really is so serious, and the threat so severe, that people may be detained indefinitely without trial, what possible legitimate aim could be served by only having the power to lock up some of the people who present that threat? This is even more so, of course, if the necessity to lock up people in this way has not been shown.[284]
> ...
> No one has the right to be an international terrorist. But substitute "black", "disabled", "female", "gay", or any other similar adjective for "foreign" before "suspected international terrorist" and ask whether it would be justifiable to take power to lock up that group but not the "white", "able-bodied", "male", or "straight" suspected international terrorists. The answer is clear.[285]

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[283] *Air India*, *supra*, note 21 at para. 39.

[284] *UK Detentions*, *supra*, note 17 at para. 236.

[285] *Ibid.* at para. 238.

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In discharging its responsibility to uphold the rule of law by applying moral principles to national security legislation, especially where significant interests are affected, the House of Lords has maintained its fidelity to law.

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CONCLUSION

I began this paper with two articulations of the rule of law – one grounded in the *Charter* and the other in the *Qur'an* – highlighting not only the importance of the principle itself, but also illustrating the significant common ground between liberalism and Islam.

Common ground appears to be scarce these days, especially in light of the violence perpetrated by purported proponents of both ideals. I use the term "common ground" to reflect on the values shared by these ideals, foremost of which is a respect for shared humanity based on dignity and worth that transcends the distinctions of ethnicity, faith and status. Throughout this paper, I have attempted to assess the impact of the Canadian state's responses to perceived national security threats against the principle of shared humanity by focusing on distinctions that have been created between citizens and non-citizens, as well as between citizens themselves.

Following September 11, 2001, North American Muslims increasingly felt that they were the enemy posing the ultimate threat to society. Rather than fostering common ground, some of our leaders widened the gulf between "us" and "them". History has demonstrated that where national security comes into play governments may quickly abandon the rule of law and the moral principles that ground it. Canada's experience with the WMA illustrates this.

The ATA was the Canadian government's response to terrorism, and for various reasons, some of which were examined in this paper, Muslim Canadians saw themselves as the focus of that legislation. While it offends the rule of law, in particular many principles of legality, the ATA has shown itself to be more restrained than the IRPA. The ATA remains true, to

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some extent, to fundamental legal principles including the presumption of innocence and criminal standards of proof.

In this paper I have tried to demonstrate how the IRPA allows the Canadian state to deal with perceived threats to national security in a virtual vacuum of legality. The IRPA contains extraordinary measures, including secret evidence, *ex parte* proceedings, and indefinite detention without charge, all of which are often used in a subjective and discriminatory manner.

For the most part, judges have endorsed the IRPA model. In fact, the Supreme Court's indication in *Suresh* that the government might be justified in facilitating torture in the interests of national security may be put to the test sooner than expected, as several cases raising the issue are currently before the courts. Judges, when faced with these types of questions, may have to separate law from morality and justice. If it is any indication, the judicial record on the IRPA is not encouraging. For the most part, judges have ceded legality to policy and allowed the executive to occupy the judicial space, or in other instances have been placed in the uncomfortable position of being inquisitor and advocate. Morality seems not to order the law where the rights of non-citizens intersect with national security interests.

By contrast, in its first assessment of the ATA, the Supreme Court resisted the government's claims of a broad-based national security rationale justifying extraordinary measures. This IRPA-ATA distinction rests primarily on status, and as I have argued, citizens matter both politically and juridically in the calculus of national security. The treatment of Momin

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Khawaja, when compared with the Project Thread detainees, drives home the reality of this distinction.[286]

While disconcerting, the status-based distinction illustrates an evolution from the pre-*Charter* era, where the extraordinary powers of the WMA were employed to deal with citizen and non-citizen alike. During the WMA period, threats to national security were not differentiated by status. As the experience of Ukrainian Canadians and Japanese Canadians during the world wars attests, citizenship was simply a function of ethnicity. Therefore, while "national security" is a regressive notion from a universal rights perspective, because it accords worth only to those who are members of the *nation*, the ATA suggests that our understanding of what constitutes the *nation* may have matured beyond mere ethnicity.

The ATA's relative restraint displays, to some extent, a respect for the integrity of citizenship and the extent to which the *Charter* has become a part of policy development and law making. I qualify my comments in this regard because the ATA does not fall squarely within ordinary law. It is a hybrid of the IRPA and criminal law. And, this hybrid legislation will likely be deployed only against a small subset of our citizenry. Given contemporary discourse conflating Islam with terrorism, one may expect that Muslim Canadians will bear the brunt of the ATA. Experience over the last three years has borne this out, with many Muslim citizens facing informal "voluntary" interviews and investigations that often include inappropriate queries about faith, religious practice, community involvement and political views.

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[286] As well, the fact that a public inquiry is currently examining the circumstances leading to the transfer of Canadian Maher Arar to Syria from the United States in 2002 is evidence of the relative importance of citizenship. While the Project Thread detainees suffered significant harm and are now tarred with the "terrorist"

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The ATA, therefore, is a mixed bag when it comes to citizenship. While tempered by a respect for citizenship and rights, I believe it also serves to create a subclass of citizen for whom the standards of legality may be relaxed if necessary. Shared humanity between citizens is fractured, while it remains elusive between citizens and non-citizens. Where will the courts stand on all of this?

Despite *Operation Dismantle* and *Singh*, the bulk of Canadian jurisprudence where national security is involved reflects a record of deference and approval. *Suresh*, and most recently, *Charkaoui*, serve to perpetuate the cleavage between mere legislation and moral principles in the law, especially where non-citizens are involved. Therefore, the challenge to build common ground and establish shared humanity as a basis for policy and law may not be fully embraced by Canadian judges.[287]

However, the jurisprudential signals are beginning to differentiate, leaving a clear choice for Canadian courts. The House of Lords in *UK Detentions* issued a bold call to rally behind moral principle with a broad and generous approach to fundamental rights and justice. Contrasted with this are the cautious and parsimonious decisions of the United States Supreme Court in *Hamdi*, *Rasul* and *Padilla*, where the President was denied absolute

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label the government has neither investigated how such significant mistakes occurred nor has it taken any steps toward compensation or apology.

[287] Because policy appears to overshadow legality where national security is concerned, the natural starting point then, to revitalize and reassert shared humanity, is through policy development. Speaking from personal experience and running the risk of generalizing too much, until September 11, 2001 many Muslim citizens were not actively engaged in Canada's political process and public life. As a relatively young community, its members focused on personal and community development. The events of September 11 and the enactment of the ATA served as catalysts for increased Muslim Canadian engagement on a broader social and political level. Muslim Canadians face three important challenges in this regard. Since many are immigrants, they must first come to terms with their identity and cement their "Canadianness". Second, they must fully embrace the opportunity to participate in public life and engage in social discourse to restore equal citizenship based on shared principles rather than faith or ethnicity. And finally, they must extend the realm of fundamental moral principles to include all persons regardless of status, faith or ethnicity.

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authority to combat terrorism without any judicial oversight, but left much room to maneuver beyond the realm of moral principles.

Understandably, the fear and anger arising from the events of September 11, 2001 resulted in a number of human failings. Hate crimes increased and discrimination became accepted in social and political discourse. Fear and anger also infected the law, and Lord Hoffmann's postscript in *Rehman* is emblematic of their effect on the judicial mindset:

> I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and can remove.[288]

But the passage of time serves to temper fear and anger in judges and lay folk alike. Three years later, Lord Hoffmann's words in *UK Detentions* reflect the wisdom of sober second thought, as he questions the premise of a "threat to the life of the nation" upon which extraordinary powers are sought in the struggle against terrorism:

> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda.... [Detention without charge] in any form is not compatible with our constitution. The

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[288] *Rehman*, *supra*, note 107 at para. 62. Arguably, where the rights of non-citizens are involved, an appeal to democratic accountability *via* the electoral process is not a realistic check on executive power. Moreover, democratic elections, because of their majoritarian nature, may not be the appropriate check to ensure that minority rights are protected. This is especially true in times of war or emergency, where extraordinary measures may claim broad popular support.

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> real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve.[289]

In Canada as well, the real threat to the security of the nation and our way of life may arise not from the unknown "other" but out of our reaction to it; out of policies driven by fear and out of legislation so loosed from the moral underpinning of shared humanity that it cannot legitimately be called law.

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[289] *UK Detentions*, *supra*, note 17 at paras. 96-97.

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